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LEWIS PIERCE
M. DEW

THE COMMON

IN ERROR

FOOD

(1890)

(16,308.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 531.

LEWIS PIERCE, HERBERT M. HEATH, AND FRANKLIN
M. DREW, TRUSTEES, PLAINTIFFS IN ERROR,

vs.

THE SOMERSET RAILWAY COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF
MAINE.

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a UNITED STATES OF AMERICA, 88 :

The President of the United States of America to the honorable the judges of the supreme judicial court of the State of Maine, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of said State of Maine, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Somerset Railway Company, plaintiff, in equity, against Lewis Pierce, of Portland, in the county of Cumberland ; Herbert M. Heath, of Augusta, in the county of Kennebec, and Franklin M. Drew, of Lewiston, in the county of Androscoggin, citizens of said State of Maine & trustees under a certain mortgage deed executed by the Somerset Railroad Company on July 1, 1871, to secure the payment of certain bonds issued by said last-named company and sold in the public market for value, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or

b of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees as aforesaid, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS,
*Clerk of the Circuit Court of the United States
for the First Circuit, Maine District.*

Allowed by—

JOHN A. PETERS,
Chief Justice of the Supreme Judicial Court of Maine.

April 18, 1896.

c [Endorsed:] Writ of error. Lewis Pierce & *als.*, plaintiffs in error, v. The Somerset Railway Company.

d (Answer.)

STATE OF MAINE, }
County of Cumberland, } ss:

And now the judges of the supreme judicial court of the State of Maine, sitting at Portland, within and for said county of Cumberland, make due return of this writ of error by annexing hereto and sending herewith, under the seal of said court, a true and attested copy of the record and proceedings in the suit mentioned in said writ of error, together with all things concerning the same, to the honorable Supreme Court of the United States, as in and by said writ of error they are commanded.

In testimony whereof I, Benjamin C. Stone, clerk of said supreme judicial court for and within said county of Cumberland, have hereunto set my hand and affixed the seal of said supreme judicial court this twelfth day of May, A. D. 1896.

[Seal Sup. Jud. Court, Maine, 1820.]

B. C. STONE, *Clerk.*

e (Petition.)

STATE OF MAINE:

To the Hon. John A. Peters, chief justice of the supreme judicial court of the State of Maine:

The petition of Lewis Pierce, of Portland, in the county of Cumberland; Herbert M. Heath, of Augusta, in the county of Kennebec, and Franklin M. Drew, of Lewiston, in the county of Androscoggin, all in the State of Maine and citizens of said State, respectfully shows that your petitioners are trustees in a mortgage executed by the Somerset Railroad Company on July 1, 1871, to secure the payment of certain bonds issued by said railroad company and sold in the public market, payable in twenty years, to wit, on July 1, 1891, with interest at seven per cent. annually, of which said bonds so issued and sold \$110,600 are still outstanding and unpaid.

Your petitioners further show that in the record and proceedings

and also in the rendering of judgment in a suit before the supreme judicial court of said State of Maine, sitting within and for the county of Cumberland, in which suit The Somerset Railway, claiming to be a corporation under the laws of said State, is plaintiff and the said trustees and Wm. H. Moore, Ben. S. Collins, Benjamin Hilton, William Atkinson, Tilson H. Spaulding, Alonzo Garcelon, T. R. Herbest, C. I. Barker, John M. Robbins, and the Inhabitants of the Town of Anson, and subsequently, by amendment, Edmund F. Webb and Everett R. Drummond, are defendants, there is drawn in question the validity of certain statutes of the State of Maine, on the ground of their being repugnant to the Constitution of the United States because impairing the obligation of the contract contained in the mortgage and bonds aforesaid, and the decision is in favor of the validity of said statutes of said State and of the proceedings of said Somerset railway thereunder and against the immunity claimed by your petitioners under the Constitution of the United States.

And said petitioners, trustees as aforesaid, further show that said suit is a bill in equity, and was heard upon bill, answers, and proof, and that final judgment and decree therein were rendered on or about June 1, 1895 by said supreme judicial court of said State of Maine, which is the highest court of record and the court of last resort in said State, against your petitioners as said trustees and dismissing said bill as against all the other defendants.

Wherefore your petitioners (presenting herewith a bond with security for approval) pray that a writ of error may be allowed to issue to said supreme judicial court of said State of Maine to bring up the record in said suit to the Supreme Court of the United States for correction in that which violates the Constitution of the United States, and that the citation authorized by the laws of the United States may accompany the same.

Portland, Maine, March 2, 1896.

LEWIS PIERCE.
HERBERT M. HEATH.
FRANKLIN M. DREW.

Presented and allowed this 18th day of April, A. D. 1896, citation to issue as prayed for.

JOHN A. PETERS,
Chief Justice of the Supreme Judicial Court of Maine.

A true copy of petition for writ of error.

[Seal Sup. Jud. Court, Maine, 1820.]

Attest: B. C. STONE, *Clerk.*

h

Bond.

Know all men by these presents that we, Lewis Pierce, of Portland; Herbert M. Heath, of Augusta, and Franklin M. Drew, of Lewiston, all citizens of the State of Maine and trustees, as

principals, and John M. Robbins, Alonzo Garcelon, C. I. Barker, and T. R. Herbest, all of said Lewiston, *cestuis que trust*, under the mortgage appointing the above trustees, as sureties, are held and firmly bound unto the Somerset Railway Company in the full and just sum of five hundred dollars, to be paid to the said Somerset Railway Company, their legal successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the supreme judicial court of the State of Maine held within and for the county of Cumberland on or about June 1, 1895, in a suit depending in said court between said Somerset Railway Company, plaintiffs, in equity, and Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees, defendants, a decree was rendered against the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, and the said Pierce, Heath, and

Drew having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Somerset Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now the condition of the above obligation is such that if the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LEWIS PIERCE.

HERBERT M. HEATH.

FRANKLIN M. DREW.

JOHN M. ROBBINS.

ALONZO GARCELON.

C. I. BARKER.

T. R. HERBEST.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

Sealed and delivered in presence of—

HENRY B. CLEAVES,

H. E. RECORD,

ADDISON SMALL,

To J. M. Robbins, A. Garcelon, and C. I. Barker.

Approved by—

JOHN A. PETERS,

Chief Justice of the Supreme Judicial Court of Maine.

April 18, 1896.

A true copy of bond.

[Seal Sup. Jud. Court, Maine, 1820.]

Attest: B. C. STONE, *Clerk.*

j UNITED STATES OF AMERICA, ss :

To the Somerset Railway Company, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of the State of Maine, wherein Lewis Pierce, Herbert M. Heath, and Franklin M. Drew are plaintiffs *plaintiffs* in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN A. PETERS,

Chief Justice of the Supreme Court of the State of Maine.

k [Endorsed :] Citation. Lewis Pierce & *als.*, trustees, v. The Somerset Railway Company.

April 24, 1896.—Due service of the within citation is hereby acknowledged and accepted.

EDMUND F. WEBB,

Solicitors and Counsel for Defendants in Error.

l (Record.)

STATE OF MAINE, }
Cumberland, } ss :

At the supreme judicial court, which was begun and held at Portland, within and for the county of Cumberland, on the second Tuesday of April, being the fourteenth day of said month, anno Domini 1896—present, Hon. Thomas H. Haskell, justice ; present, Hon. Sewall C. Strout, justice—on the eighth day of the term.

SOMERSET RAILWAY, in Eq., }
v. } 338.
LEWIS PIERCE *et als.*

Jan. T., 1893.—Bill filed and entered Feb. 20, 1893.

Subpœna issued as to all respondents, returnable first Tuesday of April, A. D. 1893.

April T., 1893.—Answers filed.

(Copies of bill and answers are made a part of this record.)

3 were of great value; that on said day the said Somerset Railroad Company by its mortgage deed of that date, duly executed, and recorded in said counties of Kennebec and Somerset, conveyed to said Lewis Pierce, Daniel Holland, of said Lewiston, and Stephen D. Lindsey, of Norridgewock, in said county of Somerset, in trust, and in mortgage, and to the survivor of them, and to their successors, in joint tenancy, its railroad and franchise and all its real estate, and all its personal property of every nature used in connection with said railroad, together with all its fixtures and all its rolling stock then in possession or to be thereafter acquired. To have and to hold said premises, in trust, for the holders of the bonds of said Somerset Railroad Company, to be issued by it to an amount not exceeding in the whole the sum of five hundred thousand dollars, payable in twenty years from the first day of July, A. D. 1871, with interest at the rate of seven per centum per annum, payable semi-annually, according to the coupons annexed to each bond; and to secure payment of said bonds and coupons to the holders thereof as they should become due according to the tenor thereof; that said Somerset Railroad Company, on said July first, A. D. 1871, made, issued and sold its bonds secured by said mortgage, to the amount of \$450,000, with proper coupons for interest thereto attached, at the rate of seven per cent., payable semi-annually, on the first days of January and of July, in each year, for twenty years thereafter; the principal sum of said bonds was payable on July first, A. D. 1891; and the proceeds of the sale of said bonds were applied to the building, equipping and operating of said railroad from said West Waterville to said North Anson; and said railroad was duly opened to the public and commenced running from said West Waterville, in said county of Kennebec, through the town of Fairfield, to Norridgewock in the year A. D. 1873; and from Norridgewock to Madison in the year A. D. 1874; and from Madison to Anson village in the year A. D. 1876; and in A. D. 1888, said railroad was extended from said Anson village to the village of Embden; and in A. D. 1890, said road was extended from said Embden village to Bingham village, in said county of Somerset. A copy of said mortgage is hereto annexed and marked "Exhibit A."

4

2.

Your orator further avers that said Pierce, Holland and Lindsey duly accepted and qualified as trustees under said mortgage; that said Stephen D. Lindsey departed this life on the 28th day of April, A. D. 1884, and that said Daniel Holland departed this life on the fifth day of May, A. D. 1890; that by due proceedings held in the supreme judicial court within and for said county of Kennebec, begun and holden on the third Tuesday of October, A. D. 1892, said Herbert M. Heath was duly appointed as trustee under said mortgage to fill the vacancy occasioned by the death of said Stephen D. Lindsey, and that said Franklin M. Drew was duly appointed by said court as trustee under said mortgage, to fill the vacancy occasioned by the death of said Daniel Holland; that both said Heath

and Drew duly accepted said trust, and qualified as such trustees, and thereafter, on the fourth day of November, A. D. 1892, said Lewis Pierce, as surviving trustee named in said mortgage, in accordance with the decree of said court conveyed to said Heath and Drew one joint undivided third part to each, of said property conveyed by said Somerset Railroad Company to said Pierce, Holland and Lindsey on said July first, A. D. 1871.

3.

Your orator further avers that said Inhabitants of said Town of Anson, William H. Moore, Alonzo Garcelon, T— R. Herbest, C— I. Barker, John M. Robbins, William Atkinson, Tileston H. Spaulding, Ben. S. Collins and Benjamin Hilton, were petitioners, in writing, in said proceedings in said supreme judicial court for the appointment of said trustees to fill the vacancies occasioned by the death of said Holland and Lindsey, and represented in their petition to said court that they were holders of bonds issued by said Somerset Railroad Company and secured by said mortgage of July first, A. D. 1871.

5

4.

Your orator further avers that on the first day of April, A. D. 1883, and for a long time prior thereto, said Somerset Railroad Company was insolvent and unable to meet its indebtedness as it matured, and its creditors threatened legal proceedings against it, and some creditors had instituted legal proceedings against it; which indebtedness, on July 13th, A. D. 1883, was ascertained and determined by the stockholders of said corporation to be as follows:

Floating debt over all assets.....	\$51,435 67
Interested on the same, estimated.....	36,000 00
Interest due on bonded debt.....	280,048 76
	<hr/>
	\$367,484 43
Bonds issued, but not then due	450,000 00
	<hr/>
	\$817,484 43

The said sum of \$367,484.43 was all due and payable on said 13th day of July, A. D. 1883; that said Somerset Railroad Company was hindered and delayed in the performance and discharge of its duties to an extent that rendered it practically impossible for it to do its current business; that the said Pierce, Holland and Lindsey, trustees named in said mortgage or deed of trust, never took possession of said mortgaged property; that the same remained in the possession of said Somerset Railroad Company until the formation of a new corporation entitled the Somerset railway, hereinafter more particularly described; and that said trustees never took any measures to secure a foreclosure of said mortgage for a breach of the condition thereof; that on the 11th day of July, A. D. 1883, there

had been a breach of the conditions of said mortgage; that said bonds to the amount of \$450,000 were then outstanding and unpaid, but not then due; that there had been a default in the payment of the interest coupons on said bonds and the same had remained due and unpaid for more than three years prior to July 11th, A. D. 1883.

6

5.

Your orator further avers that on the 11th day of July, A. D. 1883, the holders of said bonds to an amount exceeding one-half of the same, viz., to the amount of \$351,900, elected, in writing, to form a new corporation, composed of said holders, as provided by the laws of this State; and on the 15th day of August, A. D. 1883, said bondholders did form a new corporation under the name of the Somerset railway; that said corporation was organized in the manner provided in chapter fifty-one of the Revised Statutes, and acts additional thereto and amendatory thereof; that said Somerset railway adopted a code of by-laws, and elected directors, and did all acts required to be done to complete the organization of said corporation; that the capital stock of said new corporation, called the Somerset railway was \$736,648.76; and was made up as follows, viz: \$450,000 outstanding bonds secured by said mortgage as principal, and \$286,648.76 as interest upon said bonds, due August 15, A. D. 1883, and then unpaid; and that said capital stock was based on the foregoing figures, as of August 15, A. D. 1883.

6.

Your orator is informed and believes and it therefore avers that the inhabitants of said town of Anson, present owners and holders of certain unsundered bonds and coupons secured by said mortgage of July 1, A. D. 1871, and owned and held by them on the 11th day of July, A. D. 1883, on said day petitioned, in writing, requesting a meeting of said bondholders for the purpose of forming said new corporation; and on said fifteenth day of August, A. D. 1883, said inhabitants of the said town of Anson, at said meeting of said bondholders, represented said bonds, amounting at that time to \$27,500, and duly voted to form said new corporation, viz., the Somerset railway; that the bonds now held or owned by the said defendants, William H. Moore; Ben. S. Collins; Benjamin Hilton; Benjamin Hilton, surviving partner; William Atkinson; Tileston H. Spaulding; Alonzo Garcelon; T— R. Herbest; C— I. Barker;

7 and John M. Robbins, were represented by the then owners or holders thereof at said meeting of said bondholders of August 15, A. D. 1883, and the then holders or owners of said bonds voted to form said new corporation, viz., said Somerset railway; and that at said meeting the sum of \$351,900 in par value in amount of the principal of said bonds herein described was represented in the call for said meeting, and the then owners or holders of said bonds and coupons to the amount of \$351,900 voted at said meeting of August 15, A. D. 1883, to form said new corporation;

and that the whole amount of the principal of said bonds then outstanding was \$450,000; and that at said meeting said bondholders organized said new corporation, as provided by law, under the name of the said Somerset railway, viz., on the fifteenth day of August, A. D. 1883; that William H. Brown, of the firm of said Brown and Hilton, had for a long time prior to said August 15, A. D. 1883, been a director of said Somerset Railroad Company, and was an owner after July 1, A. D. 1871, of bonds secured by said mortgage, and was a stockholder in said Somerset Railroad Company; that he was elected a member of the first board of directors of said Somerset railway, and accepted said office, and was successively elected as such director and continued to accept said election and so acted as director until the time of his decease in November, A. D. 1889, and that he was a stockholder in said new corporation from its inception by converting a bond owned and held by said firm of Brown & Hilton into the capital stock of said Somerset railway, and that said Brown was an active promoter of the plan of foreclosing the old mortgage of A. D. 1871, and of organizing the said Somerset railway, and that during the time of organization of said Somerset railway said Brown used, controlled and voted in favor of said foreclosure and of said organization the bonds held and now represented by the said Benjamin Hilton.

7.

Your orator further avers that the stockholders of said Somerset Railroad Company, at its annual meeting held by adjournment on July 13, A. D. 1883, voted that said bondholders
8 organize a new corporation under the statute and take possession of the road at such date as their organization entitled them to; and said stockholders also voted to surrender possession of the said Somerset Railroad Company to said new corporation, viz., said Somerset railway, under its new organization as aforesaid, and by virtue of said votes and authority, on the first day of September, A. D. 1883, took possession of the railroad and other mortgaged property embraced in said mortgage dated July 1, A. D. 1871, and thereafter operated said railroad for the benefit of this corporation, viz., the Somerset railway, and has continued so to operate said railroad to this day; that its capital stock, \$736,648.76, as herein stated, is equal to the amount of the unpaid bonds and overdue coupons secured by said mortgage, taken at their face value at the time of the organization of this corporation, to wit: the fifteenth day of August, A. D. 1883, and the same has been divided into shares of one hundred dollars each, as required by law; and that the principal officers of your orator's corporation have issued to the holders of such bonds as have been surrendered by the holders or owners thereof to your orator, shares in the capital stock of said Somerset railway, in lieu of the bonds so surrendered, viz., one share of the capital stock of said Somerset railway for each one hundred dollars of said bonds or coupons, due August 15, A. D. 1883; that \$339,400 of the \$450,000 bonds secured by said mortgage of July 1, A. D. 1871, have been so surrendered to your orator

by the owners and holders thereof, and your orator has issued to such owners and holders shares of its capital stock to that amount, together with the amount of overdue coupons thereon to August 15, A. D. 1883; that the amount of said capital stock now issued is \$552,200; and that the amount of unconverted bonds is \$110,600. And your orator has repeatedly offered and hereby offers to issue its capital stock, as aforesaid, to all the defendants and all other persons who may be owners or holders of said bonds, as provided by law, but that the said defendants have refused to accept said offer and to surrender the bonds and coupons held by them, and receive in lieu thereof said capital stock of said Somerset railway.

9

8.

Your orator further avers that at a meeting of its stockholders held at Oakland, on the twenty-second day of June, A. D. 1887, and at a meeting of the directors of said company held at Oakland, on the first day of October, A. D. 1887, said Somerset railway was authorized to issue its bonds to the amount of \$225,000; said bonds to be payable in thirty years from the first day of July, A. D. 1887, with interest; that, for the purpose of securing said bonds and the coupons thereon, said Somerset railway conveyed, in mortgage and in trust, to Joseph R. Bodwell, then in full life, but since deceased; Edmund F. Webb and Everett R. Drummond, and their successors, in joint tenancy, the railroad of said Somerset railway, from its junction with the Maine Central railroad in said Oakland and to its terminus in Bingham, together with all the franchises of said Somerset railway and all its real estate and personal property; that said Somerset railway issued said bonds to the amount of \$225,000, which were sold upon the market; and that said trustees accepted the trust as stipulated in said deed of trust, and have continued to exercise the duties of said office from thence to this date. Said mortgage or deed of trust from the said Somerset railway to said Joseph R. Bodwell *et als.*, trustees, is made a part of this bill and marked "Exhibit B."

9.

Your orator further avers that it applied the proceeds of the sale of said \$225,000 of bonds in constructing and equipping an extension of its road, under its charter, from said village of North Anson to said Bingham village; and that said extension has been constructed and is now open to the public and is in full operation by said Somerset railway; that your orator has also constructed a branch railroad track of one mile in length extending from its main line in Norridgewock to Dodlin granite quarry; that it has contracted debts, and made and issued promissory notes, and now has current liabilities amounting to about \$65,000, and that
 10 it, relying on the validity of its title derived as aforesaid, and in consequence thereof, has made and still is making extensive improvements and repairs upon said railroad, has made plans, contracts, and purchases in advance for so improving, maintaining and operating said railway.

10.

Your orator further avers that said mortgage given to secure the bonds on which said Somerset Railroad Company was formed, dated July 1, A. D. 1871, was foreclosed by a decree of the supreme judicial court in the county of Kennebec, as provided by law; the final decree therein being made on the first day of April, A. D. 1887; and that said judgment of foreclosure has never been reversed or annulled but remains in full force, and such foreclosure by the statute of this State inures to the benefit of your orator; and that said mortgage given by said Somerset Railroad Company to said Pierce *et als.*, has become *functus officio*, and that it has ceased to be security for said bonds.

Your orator further avers that on the eighth day of July, A. D. 1884, it became the sole owner of all the right in equity which said Somerset Railroad Company, or any parties claiming under it, had of redeeming said mortgaged property from said mortgage of July 1, A. D. 1871, by deed of that date from Charles R. McFadden, deputy sheriff, by virtue of the sale on execution of said right of redemption and that the time for redeeming from said sale long since expired without any redemption therefrom, and your orator has ever since and now owns said equity of redemption. A copy of said deed is hereby annexed and marked "Exhibit C."

11.

Your orator further avers that it is the sole and absolute owner of all the property described in said mortgage of July 1, A. D. 1871, subject to the said mortgage to the said Joseph R. Bodwell *et als.*, trustees, and that the defendants owning said bonds
11 secured by said mortgage of July 1, A. D. 1871, and all other owners and holders of the bonds and coupons secured thereby, should be required to surrender them to your orator and take in lieu of them capital stock of your orator's said corporation, as provided by law.

12.

Your orator further avers that on the third day of December, A. D. 1892, said Lewis Pierce, Herbert M. Heath and Franklin M. Drew, then well knowing all the premises, sued out of the clerk's office in the supreme judicial court in and for said county of Somerset, a writ of entry in the names of the said Pierce, Heath and Drew, as trustees, as herein stated, against John Ayer, who is president of your orator's corporation; William M. Ayer, who is superintendent of your orator's corporation; Abner R. Small, who is treasurer of your orator's corporation; Horace W. Greeley, who is accountant of your orator's corporation; W. S. Tobey, who is your orator's station agent in said Norridgewock; E. V. Manson, who is your orator's station agent at said Madison; F. L. Powers, who is your orator's station agent at said Anson; F. H. Pease, who is your orator's station agent at said North Anson; S. S. Chase, who is your orator's station agent at said Embden; O. Allen, who is your

orator's station agent at said Solon; Frank Adams, who is your orator's station agent at said Bingham; and Frank Merrill and D. S. Foster who are conductors of your orator's railway trains; all said defendants being the officers and servants of your orator, therein claiming to recover against said defendants as disseizors, the possession of said railroad lying between the south line of the town of said Fairfield, the same being the southerly line of said county of Somerset, and said Bingham village; together with all its appurtenances and equipment; and said plaintiffs claim in said writ to recover of said defendants, as individuals, the sum of \$180,000 as mesne profits; and caused the individual property of the said defendants named in said writ, to be attached in the sum of \$200,000; and have entered said action in said court, and claim

12 the right to take judgment therein, and cause execution to issue thereon, and take possession of the road and property therein described.

And your orator further avers, that on the third day of December, A. D. 1892, said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, then well knowing all the premises, sued out of the clerk's office of the supreme judicial court in and for the county of Kennebec, a writ of entry, in the names of said Pierce, Heath and Drew, as plaintiffs, and against John Ayer, who is president of your orator's corporation; William M. Ayer, who is superintendent of your orator's corporation; Abner R. Small, who is treasurer of your orator's corporation; Horace W. Greeley, who is accountant of your orator's corporation; Frank Merrill and D. S. Foster, who are conductors of the railway trains of your orator, and H. A. Burrill, who is your orator's station agent at said Oakland, in the county of Kennebec; therein claiming to recover against said defendants, as disseizors, possession of said railroad from the south line of the town of said Fairfield, the same being the southerly line of said county of Somerset, to its connection with the Maine Central Railroad Company at said Oakland; together with all its appurtenances and equipment; and said plaintiffs claim in said writ to recover of said defendants the sum of \$90,000, as mesne profits and caused the individual property of the defendants named in said writ to be attached in the sum of \$200,000; that said writ is returnable at the March term of said court, A. D. 1893, at Augusta; and that said plaintiffs have served written notice upon the defendants named in said writ that trial will be expected of said cause at said March term of said court, A. D. 1893; and said plaintiffs claim the right to take judgment therein and cause execution to issue thereon and take possession of said railroad and other property therein described.

And your orator further avers that all the alleged causes of action, as claimed and set out by Pierce *et als.*, in said respective suits at law against said John Ayer *et als.*, pending in said counties of Somerset and Kennebec, arise and flow from said mortgage deed of July 1, A. D. 1891, and the said bonds secured

13 thereby, as herein set forth. And the plaintiffs annex to

this bill a copy of each of said writs marked respectively "Exhibits D" and "E."

13.

And your orator avers that the appointment of the said Heath and Drew, as trustees, in place of the said Lindsey and Holland; and that both the suits at law herein described, were advised and promoted, and are now being prosecuted by the defendants herein named in this suit, as holders of said outstanding and unconverted bonds.

And your orator makes all exhibits herein referred to a part of this bill the same as is recited herein at length.

14.

And your orator further avers that all the proceedings of the stockholders and bondholders of said Somerset Railroad Company, and the formation of the new company, viz., the Somerset railway, in A. D. 1883, of herein recited, were within the knowledge of the said defendants, and without their objection; and your orator avers that it has acted in good faith in the organization of said Somerset railway; and in issuing said \$225,000 in bonds; and securing the same by a mortgage of said road and its appurtenances, and in building with the proceeds thereof said extension from North Anson to Bingham, and from its main line in Norridgewock to Dodlin granite quarry, and in making its contracts, and all other improvements made since the organization of the Somerset railway; and had no knowledge that either of the said defendants or those whom they succeed, claimed to avoid said foreclosure, organization, title, or possession of your orator; and it avers that the said defendants and those whom they succeed, each of them, stood by and allowed and encouraged the formation of said Somerset railway; and the surrendering of the bonds and issuing in lieu thereof, the capital

14 stock, as herein set forth; and the execution of the said mortgage of its property to secure the payment of said \$225,000; the extension of its road; the contracting of debts; the expending of large amounts of money and useful repairs and improvements, without making known to your orator that the said defendants, or those whom they succeed, either as trustees, or as bondholders, had any claim or cause of action against your orator, its railroad, property, or franchises, other than the right of said owners or holders of said bonds to surrender the same to your orator and to receive in lieu therefor its capital stock, as provided by law; or that either of said defendants or those whom they succeed, claim to avoid the title of possession of your orator for any cause; and your orator avers that the said defendants, and those whom they succeed, have been guilty of such delay and laches, and such fraudulent conduct toward your orator, as herein set forth, that they, and each of them, their agents, attorneys and assigns, are estopped in equity and good conscience from denying the validity of your orator's corporation, title or possession; and from in any way disputing the title or possession of your orator in said premises herein de-

scribed, and from asserting any right, title or interest adverse to your orator's title and possession.

15.

And your orator further avers that it is informed and believes, and it therefore avers that said defendants pretend and claim that your orator, the said Somerset railway, is not a legal corporation; and consequently the title of your orator to said railroad and property is invalid and worthless, and that your orator is not entitled to possession thereof, and occupies said premises only as a disseizor; and that said mortgage of July 1, A. D. 1871, and said outstanding and unconverted bonds prevail over and take precedence of your orator's title and possession; and that defendants herein named will dispute your orator's title and possession, and will claim the right of immediate and permanent possession of said property themselves; and will endeavor to oust your orator from its possession aforesaid; and threaten to break up and terminate your orator's operation and improvement of said railroad; and the

15 defendants herein named further claim that the said bondholders who have surrendered their bonds to your orator and taken the capital stock of your orator in lieu, cannot reclaim their bonds or have them restored to the rights accorded to them under said mortgage; and that your orator's corporation will be annulled and its capital stock declared invalid; and that the \$110,600 of said bonds that have not been surrendered and converted into the capital stock of your orator, including the coupons thereon, will be the only bonds protected or secured by said mortgage of July 1, A. D. 1871; and that the bonds surrendered to your orator and the capital stock given out by your orator to such bondholders, in lieu thereof, are both invalid, and that neither said stock or bonds can be protected under said mortgage of July 1, A. D. 1871; and that the mortgage made by your orator to secure its issue of bonds of \$225,000, as herein stated, is invalid, and the bonds secured thereby are also invalid and worthless, and that the holders thereof will have no claim against the property mortgaged July 1, A. D. 1871, as herein described; and that such new bondholders will have no claim upon the extension of your orator's said railway, built with the proceeds of the sale of said \$225,000 in bonds, from said village of North Anson to said Bingham, and from your orator's main track in said Norridgewock to said Dodlin granite quarry, for reimbursement for any of the money obtained from the holders of said bonds by your orator, and expended as herein stated in the construction and extension of said railroad; and that the defendant bondholders herein named who have not so surrendered their said bonds and taken stock in lieu thereof, will claim to hold the entire railroad property from said Oakland to said Bingham, including that portion of said railroad which was constructed with the funds received from the sale of said \$225,000 of bonds.

Your orator further avers that by said action of said defendants, your orator's title and possession of said railroad and improvements and expenditures thereon, are threatened with a multiplicity of suits

and put in doubt, and that irreparable injury and permanent mischief will follow, and that it is necessary in order that your orator may operate said railroad as herein stated, that this court should remove said doubt and assure it of its title and possession.

16.

And your orator further avers that the legality of said foreclosure, and of organization of said new corporation, and the questions of estoppel, and of laches, herein set forth; and the relative equities between the outstanding bonds and those which were surrendered in exchange for capital stock; and the status of said capital stock issued; and the status of the mortgage July 1, A. D. 1871; and its cancellation; and the status of the new corporation; and its new issue of bonds; and the relation thereto of said extension and addition to said railroad built with the proceeds of the sale of the bonds issued by your orator; and the title and the possession of said extension; and the relative equities of the holders of said new bonds, and of the bonds held by the defendants, as herein set forth; and the rights of the defendants as a dissenting minority of bondholders; and other controversies herein stated and arising, involve equitable rights and interests which are exclusively cognizable in a court of equity wherein the whole controversy herein stated can be determined. That the issues arising between your orator and the defendants and the owners of said outstanding bonds cannot be determined in a court of law; and that said suits at law will interrupt the full exercise of the jurisdiction of a court of equity.

That Edmund F. Webb and Everett R. Drummond, both of Waterville in the county of Kennebec, trustees of the mortgage mentioned in paragraph eight of said bill, refuse to join as plaintiffs in said bill and are made respondents on account of the interest which they have in the subject-matter in said suit.

And inasmuch as your orator is remediless except in equity, it prays that said Lewis Pierce, Herbert M. Heath, Franklin M. Drew, the Inhabitants of the Town of Anson; William H. Moore; Ben.

17 S. Collins; Benjamin Hilton; Benjamin Hilton, surviving partner; William Atkinson; Tileston H. Spaulding; Alonzo Garcelon; T— R. Herbest; C— I. Barker; and John M. Robbins and said Edmund F. Webb and Everett R. Drummond, may make full and true answers to all and singular the charges and allegations set forth in this bill of complaint; and that thereupon the court will decree that your orator's said title and possession may be declared valid; and that said mortgage deed of July 1, A. D. 1871, may be declared void; that all of the said defendants holding said bonds secured by said mortgage of July 1, A. D. 1871, who have not surrendered and exchanged said bonds for stock as aforesaid, and have not taken capital stock of your orator's corporation, may be ordered to surrender to your orator such bonds and coupons, and to take in lieu therefor shares in the capital stock of your orator's corporation, as provided by law; and that your orator may have such other and further relief in the premises as to your

honors shall seem meet and the nature of this case may require, and that the said Lewis Pierce; Herbert M. Heath; Franklin M. Drew; Inhabitants of Town of Anson; William Moore; Ben. S. Collins; Benj. Hilton; Benjamin Hilton, surviving partner; William Atkinson; Alonzo Garcelon; Tileston H. Spaulding; T— R. Herbest; C— I. Barker; John M. Robbins, and said Edmund F. Webb and Everett R. Drummond, their agents, attorneys, or assigns, may be enjoined, by temporary and perpetual injunction from prosecuting either of said suits at law, and from disputing the title or possession of your orator to the real estate or personal property hereinbefore described.

May it please the court to grant to your orator a writ of subpoena directed to the said Lewis Pierce; Herbert M. Heath; Franklin M. Drew; Inhabitants of Town of Anson; William Moore; Ben. S. Collins; Benjamin Hilton; Benjamin Hilton, surviving partner; William Atkinson; Tileston H. Spaulding; Alonzo Garcelon; T— R. Herbest; C— I. Barker; and John M. Robbins, in the form provided by law and the rules of this court.

Dated this fourteenth day of February, A. D. 1893.

[L. S.]

SOMERSET RAILWAY,
By ABNER R. SMALL,
Its Treasurer, Duly Authorized.

18 STATE OF MAINE, { ss:
Kennebec, }

FEBRUARY 20, A. D. 1893.

Then personally appeared the above-named Abner R. Small, treasurer of the Somerset railway, and made oath that he has read the foregoing bill, signed by him, and knows the contents thereof, and that the same are true, except the matters stated on his information and belief, and that as to those matters, he believes them to be true.

Before me—

E. F. WEBB,

Justice of the Peace.

Complainants' solicitors, Webb, Johnson & Webb, Waterville, Me.

EXHIBIT A.

Mortgage—Somerset Railroad Company to Lewis Pierce and Others.

Whereas the Somerset Railroad Company, a corporation established by law, in accordance with a vote of its stockholders, at a meeting thereof, held at Anson, on the thirteenth day of April, A. D. 1871, and at a meeting of the directors of said company, held at Anson, on the fourth day of May, A. D. 1871, proposed to issue its bonds to an amount not exceeding in the whole five hundred thousand dollars, payable at Boston, in the Commonwealth of Massachusetts, and at the treasurer's office of said company, in twenty years from the first day of July, A. D. 1871, with interest at the rate of seven per cent. per annum, payable semi-annually, in Boston, and at the treasurer's office of said company, aforesaid, in gold, according to the coupons annexed to each bond, each of which bonds is to be signed by the president and treasurer of said company, in its behalf, and countersigned by two at least of the trustees hereinafter

named. Now for the purpose of securing the bonds, aforesaid, and the coupons thereunto annexed.

19 Know all men by these presents, that the said Somerset Railroad Company, in consideration of the engagement herein made, and of one dollar to them paid by Lewis Pierce, of Portland in the county of Cumberland; Daniel Holland, of Lewiston, in the county of Androscoggin, and Stephen D. Lindsey, of Norridgewock, in the county of Somerset, doth hereby give, grant, bargain, sell and convey to the said Lewis Pierce, Daniel Holland and Stephen D. Lindsey, and their successors in joint tenancy, the railroad of said Somerset railroad, in Waterville, in the county of Kennebec, to its terminus in Solon, in the county of Somerset, and situate in the counties of Kennebec and Somerset, with the franchise of said company and all its real estate, and all its personal property of every nature used in connection with its said railroad, now possessed or to be hereafter acquired.

To have and to hold the aforegranted and bargained premises with all the privileges and appurtenances thereof to said grantees, and their successors, in joint tenancy forever; but in trust, nevertheless, as hereinafter provided, and the said Somerset Railroad Company doth hereby covenant with the said grantees and their successors, that it has good right to sell and convey all the property aforesaid, that the same is free from all incumbrances, and that it will warrant and defend the same to said grantees and their successors, against the lawful claims and demands of all persons.

Provided, however, if the said company shall pay said bonds and coupons as they severally become due, and do and perform all on their part to be done and performed as hereinafter stipulated, this deed shall be null and void, otherwise in full force.

This conveyance is made to said grantees for the benefit of the holders of the bonds of said company, to be issued as herein provided upon the trusts and stipulations following:

First. Said grantees hereby accept said trust and hereby covenant with said company to perform it faithfully according to the stipulations of this deed and the provisions of law.

Second. It is agreed that said company shall keep said property in good repair.

20 Third. Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges, *prima facie* of said breach of conditions; and said company shall submit without resistance to any act of theirs for such purposes, not being bound by their judgment in a final trial and decision respecting a breach of condition.

Fourth. Said company shall be entitled to the possession and management of said property, until breach of condition of this mortgage and also in case — breach of condition where subsequent performance by it is accepted.

Fifth. Said trustees shall in no event be personally liable for the doings of each other. Each is to be accountable for his own misdoings, only. A majority of them may do any act herein provided for, when it appears that the other had notice and declined to act, or omitted to attend a meeting, duly notified, when that matter was to be under consideration.

It is further agreed that said company, may, in its discretion, sell, exchange or otherwise dispose of any or all locomotives, tenders, cars, rolling stock, tools and materials, and all other personal property which may become impaired by use, or require renewal, and convey the same free and clear of lien of this mortgage, but all property of whatsoever kind, whether real or personal, obtained in place of property sold or disposed of as aforesaid, or otherwise acquired hereafter by said company, shall be and become subject to, and bound by the lien of this mortgage, as if it were now owned by it and especially described herein.

It is further agreed that said railroad company shall at the request of its trustees, execute and deliver, such further deeds of conveyance of all the property now possessed or to be hereafter acquired by said company, herein conveyed or intended to be conveyed, and upon the trust herein set forth, as may be necessary for the better security of said bonds.

21 It is hereby agreed that either of said trustees may resign, such resignation to take effect sixty days after notice thereof in writing to said company and to his cotrustees.

In witness whereof, the Somerset Railroad Company has caused this deed to be subscribed in its behalf, by Francis W. Hill, president of said company, and countersigned by George A. Fletcher, its treasurer, and its seal affixed, and the said Francis W. Hill and George A. Fletcher, have hereunto set their hands and seals, this first day of July, A. D. 1871.

FRANCIS W. HILL, [SEAL.]

President of Somerset Railroad Company.

Countersigned:

GEORGE A. FLETCHER, [SEAL.]

Treasurer of Somerset Railroad Company.

SOMERSET, ss:

JULY 1ST, 1871.

Personally appeared Francis W. Hill, president of the Somerset Railroad Company, and acknowledged this instrument by him signed in his said capacity, to be his free act and deed in his said capacity.

Before me—

JOHN H. WEBSTER,

Justice of the Peace.

T. D. BOYD, witness to—

LEWIS PIERCE.

[SEAL.]

W. A. PEDGIN, to DANIEL HOLLAND. [TRUSTEES' SEAL.]

STEPHEN D. LINDSEY. [SEAL.]

Witness to signature of S. D. Lindsey:

EDW. ROWE.

KENNEBEC, ss :

Received August 31, at 12 h. 40 m., p. m. Entered and compared with the original by—

P. M. FOGLER, *Register.*

REGISTRY OF DEEDS, KENNEBEC COUNTY,
AUGUSTA, MAINE, *June 24, 1890.*

I, Prentiss M. Fogler, register of deeds, in and for the county of
Kennebec, do hereby certify that the foregoing instrument,
22 is a true copy of the record as recorded in vol. 290, page 319,
of said registry.

Attest :

P. M. FOGLER,
Register of Deeds.

EXHIBIT B.

Whereas the Somerset railway, a corporation established by law, in accordance with a vote of its stockholders at a meeting thereof, held at Oakland, on the twenty-second day of June A. D. 1887, and at a meeting of the directors of said company, held at Oakland, on the first day of October, A. D. 1887, authorized the issue of its bonds to an amount not exceeding in the whole two hundred and twenty-five thousand dollars, payable at Boston in the Commonwealth of Massachusetts, and at the treasurer's office of said company, in thirty years from the first day of July, A. D. 1887, with interest at the rate of five per cent. per annum, payable semi-annually, in Boston, and at the treasurer's office of said company aforesaid, according to the coupons annexed to each bond, each of which bonds is to be signed by the president and treasurer of said company in its behalf and countersigned by two at least of the trustees herein-after named, now for the purpose of securing the bonds aforesaid, and the coupons thereunto annexed.

Know all men by these presents. That the said Somerset railway in consideration of the engagement herein made, and of one dollar to them paid by Joseph R. Bodwell, of Hallowell, in the county of Kennebec, Edmund F. Webb and Everett R. Drummond, both of Waterville, in said county, doth hereby give, grant, bargain, sell and convey to the said Joseph R. Bodwell, Edmund F. Webb and Everett R. Drummond and their successors, in joint tenancy, the railroad of said Somerset railway from its junction with the Maine Central railroad, in Oakland, in the county of Kennebec, to its terminus in Bingham, in the county of Somerset, and
situate in the counties of Kennebec and Somerset, with the
23 franchise of said company and all its real estate and all its personal property of every nature used in connection with its said railroad now possessed or to be hereafter acquired.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to said grantees and their successors, in joint tenancy forever, but in trust nevertheless as hereinafter provided; and the said Somerset railway doth hereby covenant with the said grantees and their successors, that it

has good right to sell and convey all the property aforesaid, that the same is free from all incumbrances, and that it will warrant and defend the same to said grantees and their successors, against the lawful claims and demands of all persons. Provided, however, if the said company shall pay said bonds and coupons as they severally become due, and do and perform all on their part to be done and performed, as hereinafter stipulated, this deed shall be null and void, otherwise remain in full force.

This conveyance is made to said grantees for the benefit of the holders of the bonds of said company to be issued as herein provided upon the trusts and stipulations following:

First. Said grantees hereby accept said trust and hereby covenant with said company to perform it faithfully according to the stipulations of this deed and the provisions of law.

Second. It is agreed that said company shall keep said property in good repair.

Third. Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees, for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges *prima facie* of said breach of condition, and said company shall submit without resistance to any act of theirs, for such purposes, not being bound by their judgment in a final trial and decision respecting a breach of condition.

Fourth. Said company shall be entitled to the possession and management of said property until breach of condition of this
24 mortgage, and also in case of breach of condition where subsequent performance by it is accepted.

Fifth. Said trustees shall in no event be personally liable for the doings of each other, but each is to be accountable for his own misdoings only; a majority of them may do any act herein provided for when it appears that the other had notice and declined to act, or omitted to attend a meeting duly notified, when that matter was to be under consideration.

Sixth. It is further agreed that said company may in its discretion, sell, exchange or otherwise dispose of any or all locomotives, tenders, cars, rolling stock, tools and materials, and all other personal property which may become impaired by use, or require renewal, and convey the same free and clear of all lien of this mortgage, but all property of whatever kind, whether real or personal, obtained in place of property sold or disposed of as aforesaid, or otherwise acquired hereafter by said company, shall be and become subject to, and bound by the lien of this mortgage, as if it were now owned by it and especially described herein, and if personal property, shall be deemed when acquired to be attached to said real estate.

Seventh. It is further agreed that said railroad company shall at the request of its trustees, execute and deliver such further deeds of conveyance of all the property now possessed or to be hereafter acquired by said company, herein conveyed or intended to be con-

veyed, and upon the trust herein set forth, as may be necessary for the better security of said bonds.

Eighth. It is hereby agreed that either of said trustees may resign; such resignation to take effect sixty days after notice thereof in writing to said company, and to his cotrustees.

In witness whereof, the Somerset railway has caused this deed to be subscribed in its behalf by John Ayer, president of said company, and countersigned by Abner R. Small, its treasurer, and its seal affixed, and we, the said Joseph R. Bodwell, Edmund F. Webb, and Everett R. Drummond, in token of our acceptance of said trust have hereunto set our hands and seals, this fifteenth day of October, A. D. 1887.

(Signed) JOHN AYER,

President Somerset Railway.

Countersigned:

ABNER R. SMALL,

Treasurer Somerset Railway.

JOSEPH R. BODWELL,

[SEAL.]

EDMUND F. WEBB,

[SEAL.]

EVERETT R. DRUMMOND,

[SEAL.]

Trustees.

KENNEBEC, ss:

OCTOBER 15, 1887.

Personally appeared John Ayer, president of the Somerset railway, and acknowledged this instrument by him signed in his said capacity to be the free act and deed of said corporation.

Before me—

(Signed)

GEORGE W. FIELD,

Justice of the Peace.

KENNEBEC, ss:

REGISTRY OF DEEDS.

Received October 17, 1887, at 4 h. 10 m. p. m. and recorded in Book 366, page 423.

Attest:

P. M. FOGLER, *Register.*

SOMERSET, ss:

REGISTRY OF DEEDS.

Received October 21, 1887, at 8 h. a. m. and recorded in vol. 193, page- 238, 239, 240.

Attest:

W. H. EMERY.

I certify that this is the only deed of trust, mortgage or indenture of the Somerset railway, on record in this office.

Skowhegan, Maine, March 28, 1889.

W. H. EMERY.

KENNEBEC, ss:

REGISTRY OF DEEDS.

I hereby certify that the within instrument is the only deed of

trust, or mortgage or indenture of the Somerset railway, which appears of record in this office.

Augusta, March 28, 1889.

Attest:

P. M. FOGLER, *Register*.

26

EXHIBIT C.

(*Sheriff's Deed on Execution.*)

Know all men by these presents, that I, Charles R. McFadden of Waterville, in the county of Kennebec and State of Maine, a deputy sheriff duly commissioned by George R. Stevens, sheriff of the county of Kennebec, aforesaid, by virtue of an execution which issued on a judgment recovered at a term of the superior court, for the county of Kennebec holden at Augusta in the said county of Kennebec, on the first Tuesday of December, A. D. 1882, by the Dunn Edge Tool Company, a corporation established by the laws of the State of Maine, and having an office at Waterville, in said county of Kennebec, and State of Maine, against the Somerset Railroad Company, a corporation established by the laws of the State of Maine, and having an office at Oakland, formerly West Waterville, in said county of Kennebec, for the sum of thirty-eight thousand three hundred and sixty-five dollars and twenty-seven cents, debt or damage, and fifteen dollars and fifteen cents, costs of said suit, I have taken all the right in equity which the Somerset Railroad Company had on the twenty-sixth day of May, A. D. 1884, being the day the same was seized on the execution in said case, of redeeming the following mortgaged premises, to wit: The railroad extending from its junction with the Maine Central railroad in Waterville, in the county of Kennebec, to its terminus in Solon, in the county of Somerset, and situated in the counties of Kennebec and Somerset, with the franchise of said company and all its real estate connected therewith, as described in said mortgage. And on the twenty-ninth day of May, A. D. 1884, I gave notice in writing to the said Somerset Railroad Company, the within-named debtor, by leaving an attested copy of said notice at the office of said Somerset Railroad Company, that on the eighth day of July, A. D. 1884, at ten o'clock in the forenoon, at the office of the Dunn Edge Tool Company, in the town of Oakland, in said county of Kennebec, I should sell said right of equity of redemption at public auction to satisfy said execution and all fees and charges of said sale, unless redeemed

27 by otherwise satisfying said execution, said notice having been given at least thirty days before said time appointed for the sale, and I also posted up notifications of the time and place of said sale at the court-house in the county of Kennebec, and at the court-house of Somerset, said notices having been posted at least thirty days before the eighth day of July, A. D. 1884, aforesaid, being the day of said sale above described. And I also caused a notice thereof to be inserted in the Waterville Mail, a newspaper published in the county of Kennebec, three weeks successively and in the Somerset Reporter, a newspaper published in the county of Somer-

set, three weeks successively, the last publication in each of said newspapers being at least four days before the said eighth day of July, A. D. 1884, aforesaid, the day of said sale, to wit: in the Waterville Mail, on the twentieth day of June, A. D. 1884, and in Somerset Reporter, on the eighteenth day of June, A. D. 1884. When at the time and place above described, said equity not having been redeemed by otherwise satisfying the execution, I sold said right of equity of redemption at public auction, to the Somerset railway, a corporation established by the laws of the State of Maine, and having an office at Oakland, in the said county of Kennebec, and State of Maine. It being the highest bidder therefor, and more than any other person offered, for the sum of eight hundred dollars, and in consideration of the sum of eight hundred dollars aforesaid, paid to me in hand by the said Somerset railway, the receipt of which I hereby acknowledge, have given, granted, bargained and sold and by these presents do hereby give, grant, bargain, sell and convey unto the said Somerset railway its successors and assigns forever, all the right in equity the Somerset Railroad Company had on said twenty-sixth day of May, A. D. 1884, the day of the seizure thereof, to redeem the premises above described, with all the appurtenances thereto pertaining.

To have and to hold to the said Somerset railway, its successors and assigns to their use and behoof forever. Subject, however, to be redeemed agreeably to law, in such cases made and provided.

28 In witness whereof, I have hereunto set my hand and seal, this eighth day of July, in the year of our Lord, one thousand eight hundred and eighty-four.

CHARLES R. McFADDEN, [SEAL.]
Deputy Sheriff.

Signed, sealed and delivered in the presence of—
F. A. WALDRON.

KENNEBEC, ss :

WATERVILLE, *July 17, A. D. 1884.*

Then personally appeared the above-named Charles R. McFadden and acknowledged the above instrument to be his free act and deed.

F. A. WALDRON,
Justice of the Peace.

KENNEBEC, ss :

Received December 3, 1888, at 10 h. 25 m. a. m. Entered and compared.

P. M. FOGLER, *Register.*

[SEAL.]

EXHIBIT D.

STATE OF MAINE, }
Somerset, } 88 :

To the sheriffs of our several counties or either of their deputies, or any constable of the town of —, in the county of —, Greeting:

We command you to attach the goods and estate of John Ayer, William M. Ayer, A. R. Small, and Horace W. Greely, all of Oakland in the county of Kennebec, and W. S. Tobey of Norridgewock, E. V. Manson of Madison, F. L. Powers of Anson, F. H. Pease of North Anson, S. S. Chase of Embden, O. Allen of Solon, Frank Adams and D. L. Foster of Bingham, all in said county of Somerset, and Frank Merrill, of Oakland aforesaid in the county of Kennebec aforesaid to the value of two hundred thousand dollars and

29 summon the said defendants (if they may be found in your precinct) to appear before our justices of our supreme judicial court, next to be holden at Skowhegan, within and for the county of Somerset, on the third Tuesday of December, A. D. 1892, then and there in our court to answer unto Lewis Pierce, of Portland, in the county of Cumberland, Herbert M. Heath, of Augusta, in the county of Kennebec, and Franklin M. Drew, of Lewiston, in the county of Androscoggin, trustees and mortgagees under the mortgage duly executed on July 1, 1871, by the Somerset Railroad Company, a corporation duly existing under the laws of Maine, and recorded in Somerset Registry of Deeds, vol. 134, page 513; in a plea of land: wherein the said trustees, the plaintiffs, demand against the said defendants, as disseizors, the possession of the real estate, railroad, road-bed, stations, depots, depot lots and buildings, fixtures, appurtenances, bridges, fences, and rolling stock including all engines, cars, and other property of said Somerset Railroad Company, which has stations and places of business at Bingham, Solon, Embden, North Anson, Anson, Madison, and Norridgewock, in said county of Somerset, and at Oakland in said county of Kennebeck; said railroad extending southerly from its station in said Bingham village, through the towns of Bingham, Solon, Embden, Anson, Madison, and Norridgewock, above mentioned, and also through the town of Fairfield, to the south line of said county of Somerset, being the south line of said town of Fairfield, and being four rods wide, and including all the land between fences thereon from said Bingham village to the south line of said county, together with all stations, depots, depot lots, and buildings, and fixtures, bridges, fences, and rolling stock including all locomotives, engines and cars—along, upon and connected with said railroad as now used and occupied by said defendants in the management and running of said railroad from said Bingham village to said south line of said county of Somerset. Whereof the said defendants unjustly and without judgment disseized the said plaintiffs, trustees as aforesaid, within twenty years now last past, whereupon the said trustees say

that they were seized of the property and premises demanded with the fixtures and appurtenances above described within
 30 twenty years now last past in their own demesne as of fee and in trust, under the mortgage deed aforesaid, to which reference is hereby made as the origin of their title, said Lewis Pierce being one of the original trustees and mortgagees in said mortgage of July 1, 1871, and said Herbert M. Heath and Franklin M. Drew having been duly appointed trustees by the supreme judicial court of Maine, sitting in equity, to fill vacancies existing by reason of the decease of the other original trustees and mortgagees therein. And they further say that they ought now to be in quiet possession of all the property and premises above demanded of the said defendants, but the said defendants have disseized them thereof and still unjustly withhold the same. And they demand also of the said defendants the sum of thirty thousand dollars as the yearly net income and profits received by the said defendants and converted to their own use from the premises and property aforesaid, for the last six years, making one hundred and eighty thousand dollars in all which said defendants, as such disseizers, have received and wrongfully converted to their own use and profit. All which is to the damage of the said plaintiffs, (as they say) the sum of two hundred thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness: John A. Peters, Esq., at Skowhegan, the third day of December, in the year of our Lord one thousand eight hundred and ninety-two.

N. W. BRAINERD, *Clerk*.

EXHIBIT E.

Copy of Declaration in the Writ.

LEWIS PIERCE, HERBERT M. HEATH, FRANKLIN M. DREW,	}
Trustees,	
vs.	
JOHN AYER, WM. M. AYER, A. R. SMALL, HORACE W. GREELY,	}
FRANKLIN MERRILL, H. A. BURRILL, and D. L. FOSTER.	

Said writ returnable to the March term, A. D. 1893, of the supreme judicial court, Kennebec county.

Ad damnum \$90,000.

31 On the 6th of December the real estate of John Ayer, Wm. M. Ayer, A. R. Small, Horace W. Greely, Franklin Merrill, H. A. Burrill, and D. L. Foster was attached on the writ:

"To answer unto Lewis Pierce, of Portland, in the county of Cumberland, Herbert M. Heath, of Augusta, in said county of Kennebec, and Franklin M. Drew, of Lewiston, in county of Androscoggin, trustees and mortgagees under a mortgage executed July 1, 1871, by the Somerset Railroad Company, a corporation duly existing by law, which said mortgage is duly recorded in the registry of

deeds for the county of Kennebec in vol. 290, p. 319, in a plea of land; wherein the said trustees, the plaintiffs, demand against the defendants aforesaid as disseizors, the possession of the railroad, road-bed, real estate, stations, depots, depot lots, and buildings thereon, fixtures, bridges, fences, rolling stock, including engines, locomotives, and cars of said Somerset Railroad Company, situate in said Oakland in said county of Kennebec, and extending from the north line of said county, which is the north line of said Oakland, southerly to the depot of said Somerset Railroad Company in the village of said Oakland, and including said depot and depot lot and buildings thereon:—said railroad being four rods wide, and including all lands within the fences on both sides thereof from the north line of said county to and including said depot and depot lot and buildings to a distance of six miles more or less, with all stations or depots, and depot lots and buildings and bridges and fixtures and rolling stock, including engines, locomotives and cars upon, along, and connected with said railroad, as now used, managed, and operated by said defendants; whereof the said defendants unjustly and without judgment disseized the said trustees, the plaintiffs, within twenty years now last past.

Whereupon the said trustees say, that they were lawfully seized of the demanded premises and property above described with the appurtenances and fixtures in their own demesne as of fee, and in trust, under and by virtue of the mortgage aforesaid, to which they refer as the source and origin of their title to all the above-
 32 described property, within twenty years now last past, and ought now to be in quiet possession thereof, but the said defendants unlawfully and wrongfully disseized them of the same and still unlawfully keep them out and withhold the same.

And the said trustees further demand the sum of \$10,000 yearly for the last six years, making \$60,000 in all, as the net rents, profits and income, which the said defendants have wrongfully received from the premises and property herein demanded, and have converted the same to their own use. And the plaintiffs further aver that said Pierce is one of the original trustees and mortgagees to whom said mortgage was given by said Somerset Railroad Company, and said Herbert M. Heath and Franklin M. Drew have been appointed trustees by the supreme court in Maine sitting in equity, to fill vacancies caused by the decease of Stephen D. Lindsay and Daniel Holland, the other trustees and mortgagees originally therein named.

All which is to the damage of the said plaintiffs as they say the sum of \$90,000."

Writ dated 3, A. D. 1892.

(Answer of Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, Trustees.)

The joint and several answer of Lewis Pierce, Herbert M. Heath and Franklin M. Drew, trustees, who say that they do not admit that there is any such corporation as the Somerset railway, as is

alleged in the commencement of said bill of complaint, or that it was ever established under any law of Maine; but they deny its existence for reasons hereafter more fully stated but which are to be regarded as part of this portion of their answer; and they deny its capacity to institute this, or any, suit against these trustees.

And they do not admit, but deny, that the treasurer of any railroad corporation has authority or power to institute any suit at law, or in equity, in the name of said corporation.

33 1. They admit the allegations of paragraph one of complainant's bill, except the statement that the amount of bonds issued and sold was \$450,000. They are informed that the amount of bonds actually sold was about \$300,000, and that the remaining \$150,000, or nearly that amount, were never sold, but went into the hands of Reuben B. Dunn, F. W. Hill and John Ayer without any consideration, and that nothing was ever received for them by the Somerset Railroad Company. And these trustees are further informed that these bonds that were never sold were wrongfully used in the pretended formation of the Somerset railway. These trustees do not admit therefore that the amount of bonds issued and sold by the Somerset Railroad Company under the mortgage of July 1, 1871 was \$450,000, but deny the same on said information, and admit that only about \$300,000, were actually so sold.

2. They admit the allegations of paragraph two of said bill.

3. They admit the allegations of paragraph three as far as they go; but they say that the complainant has not stated in his bill the names of all the parties who petitioned the court for the appointment of trustees under the mortgage of July 1, 1871, although the names of such suppressed parties were as well known to said complainant as the names he set forth in paragraph three. And these trustees further answering say that in addition to the names stated in paragraph three the following persons were also petitioners for the appointment of said trustees, viz:

Mary E. Carney, holding bonds for \$1,700.00 and coupons for \$1,600.00; Nathl. G. Cutler holding bonds for \$1,500 and coupons for \$1,527.00; James Fellows holding bonds for \$500.00 and coupons for \$525.00; and Henry Ingalls holding bonds for \$1,000.00 and coupons for \$1,172.50; all which was well known to the complainant in the present bill when the same was drawn and filed, yet are not named therein. And inasmuch as the said Mary E. Carney, Nathaniel G. Cutler, James Fellows and Henry Ingalls are directly interested in the subject-matter of said suit, and liable to be gravely affected by its results, yet are not made parties thereto, these trustees object to the maintenance of said suit for want of proper parties thereto.

34 4. In answer to paragraph four, these trustees admit that prior to April 1, 1883, many of the coupons for interest had not been paid; and that for ten years prior thereto, many coupons upon a portion of said bonds remained unpaid. Whether said corporation would have been unable to pay them if its moneys had been properly applied to such payment by those having the control of it, these trustees have not sufficient knowledge or information to

state affirmatively; and therefore whether said Somerset Railroad Company was insolvent or not, they are unable to answer, and do not admit it, but require proof thereof.

They admit that the trustees named in the mortgage of July 1, 1871, never took actual possession, or control of said mortgaged property, and never took any step towards the foreclosure of said mortgage. For the reasons already given in answer to paragraph one, they deny that \$450,000 of bonds were outstanding and actually due on July 13, 1883, as alleged in paragraph four; and as to the remaining allegations of paragraph four, they have no sufficient knowledge, information or belief, to answer the same, and require said complaint to prove them.

5. These trustees do not admit any of the allegations of paragraph five. Upon information and belief they deny that the alleged Somerset railway has any existence as a legal corporation, as against these trustees, and as against the original corporation, the Somerset Railroad Company; and they require proof of all the allegations of said paragraph five; and if all such allegations could be proved so far as any matters of fact are concerned, these trustees deny that any legal corporation could be formed in that manner as against these trustees and said Somerset Railroad Company. And said mortgage of July 1, 1871, and the bondholders under it. They allege that it would be in violation of the contract rights of all the parties to said mortgage, there being no law in existence at the time of the execution of said mortgage, nor for many years thereafter, allowing the formation of a new corporation in the manner pretended in said paragraph five.

6. As to the allegations of paragraph six in said bill, these trustees are informed and believe that the town of Anson neither
35 on July 11, 1883, nor at any other time before or after, took any part or had any connection in any way whatever, with the alleged formation of the supposed Somerset railway.

They therefore deny all of the allegations of said paragraph six relating to the town of Anson. As to the allegations touching the bonds held and now owned by the remaining defendants these trustees have no sufficient knowledge, information or belief to enable them to answer the same and therefore require said complainant to prove them. They deny that any legal organization was made of said alleged Somerset railway on said Aug. 15, 1883, or at any other time; and they deny that said Somerset railway ever had any legal existence.

As to all the remaining allegations of said paragraph six, these trustees say that they have no knowledge or information sufficient to enable them to answer the same. They do not admit any of them, but require proof.

7. These trustees have no knowledge, information or belief sufficient to enable them to answer the allegations of paragraph seven of said bill, and will require proof thereof except the averment that there are now outstanding \$110,000 of bonds held by parties under the mortgage of July 1, 1871, who claim that said mortgage is a first mortgage upon said railroad property, and that their bonds

are secured under it. They admit this averment to be probably correct as to the amount of such bonds still outstanding.

8. These trustees admit that certain persons calling themselves the "Somerset railway" and alleging themselves to be a corporation which these trustees deny, issued bonds as alleged in said paragraph eight, and executed a mortgage upon the property of the Somerset Railroad Company to said Bodwell, Webb & Drummond to secure said bonds. How many of said bonds were actually sold, these trustees have no knowledge, information or belief, and therefore admit nothing. And they aver that the execution of said bonds and mortgage upon the property of another corporation, that property being already under a previous mortgage duly executed

and recorded, and therefore of itself due notice to every-
36 body, was without authority of law, and simply void against these trustees and these codefendants. Even if said Somerset railway were a legal corporation at the time of such issue of said bonds on July 1, 1887, and had legally succeeded to the rights of the Somerset Railroad Company, its mortgage could, at most, be a second mortgage only, and subject to the mortgage held by these trustees upon the same property sixteen years previously as we are advised.

9. As to the allegations of paragraph nine, these trustees have no knowledge or information sufficient to enable them to answer the same, and therefore require proof thereof. They aver, however, that whatever was done, was done with legal knowledge on the part of the actors, of the existence and previous execution of the mortgage of July 1, 1871, upon the same property, and that said mortgage was duly recorded and that the bonds secured by it were not yet due. So that all persons who took any part in these alleged transactions did so with full notice and knowledge from the record of the existence of a prior mortgage upon the same property, and were bound to govern themselves accordingly.

10. These trustees deny that the mortgage of July 1, 1871, was ever legally foreclosed. They aver that neither the original board of trustees nor these respondents, their lawful and only successors have ever taken any steps toward a legal foreclosure or ever determined that there had been a breach of the conditions of said mortgage. That by the express provisions of said mortgage the trustees alone had, and have the power to determine in the first instance whether a breach of the conditions had taken place, and that such power is vested in no other persons or tribunal; and that this power has never been exercised by either themselves or their predecessors. They admit that Reuben B. Dunn and John Ayer made a futile attempt to foreclose said mortgage by a bill in equity in the supreme judicial court in the county of Kennebec in the year 1887. But they aver that said Dunn and Ayer instituted said proceedings in said court without first obtaining an adjudication by said trustees that there had been a breach of the conditions of said mortgage; without which as

these respondents are advised and believe there could be no
37 legal foreclosure of said mortgage, not even by the trustees

themselves. And these respondents further aver that said Dunn and Ayer gave said trustees no notice of their suit in equity to foreclose said mortgage and did not make them parties to it; that said trustees were indispensable parties to any suit to foreclose the same and that without their being made such parties, any decree of foreclosure of said mortgage would — a nullity, and of no force as against said trustees. They aver also that said alleged decree of foreclosure was a decree of strict foreclosure, yet did not determine the amount which the mortgagors, the Somerset Railroad Company, should pay in order to save the property; and that for this reason also said alleged decree was void. And said trustees further aver that all the proceedings of said Dunn and Ayer in attempting to procure a decree of foreclosure of the mortgage of July 1, 1871, were an attempt to shorten the time of redemption secured to the mortgagors, the Somerset Railroad Company, by the mortgage contract, and were in violation of the contract rights secured to said mortgagors and to said trustees under said mortgage at the time of its execution, and were consequently utterly void, and they deny that said alleged foreclosure did, or could, in any way, by law, whether valid or invalid "inure to the benefit of the Somerset railway," if by that phrase it is intended to allege that the title of the trustees under the mortgage of July 1, 1871, vested in said Somerset railway, and deprived the bondholders under said mortgage of their security upon said property.

And said trustees deny that said mortgage of July 1, 1871, has, or could, become *functus officio* except by the payment of the bonds which was given to secure; and of these the complainant admits that \$110,000, are still outstanding and unpaid. And for the payment of those bonds to that amount, or to nearly that amount, with the interest due upon them, said trustees aver that the mortgage of July 1, 1871, is a valid security, and that they have brought writs of entry to secure said property for that purpose, and they deny that any statute of this State has been enacted, or could be

38 enacted, which will or can deprive said bondholders and trustees of the rights secured to them by virtue of their contract of July 1, 1871, and the laws of said State in force when said contract was made. And said trustees admit that on July 8, 1884, a deed was executed by Charles R. McFadden, deputy sheriff, purporting to be made at a sale on execution of the right, which the Somerset Railroad Company had, to redeem said mortgaged property under the mortgage of July 1, 1871; that said deed purported to be made to said Somerset railway, and purported to convey to said Somerset railway the right which the Somerset Railroad Company, then had to redeem the mortgage under which these trustees now claim. These trustees are informed, advised, and believe that nothing passed by virtue of said McFadden's deed, because there was no such corporation in existence as the "Somerset railway," the supposed grantee; and because also the provisions of the statute authorizing the sale of such equity were not complied with and followed, and the supposed sale was therefore void.

And further answering they say that this court in a suit between

these same parties has decided that said mortgage of July 1, 1871, is still a valid security and that these parties are bound by said adjudication of said court. But if said sale was valid, as, the complainant in this bill seems to suppose, then said McFadden's deed conveyed to said Somerset railway the right to redeem the mortgage now held by these trustees upon payment of the amount legally due thereon, and estops said Somerset railway from denying the validity of said mortgage. And inasmuch as this is not a bill to redeem the same, said trustees pray that it be dismissed.

11. In answer to paragraph eleven in said bill, said trustees deny, for the reasons already set forth in this answer that said alleged Somerset railway has any legal existence, and can therefore own neither the property belonging to the Somerset Railroad Company nor anything else.

But taking its own statements of fact in this bill to be true, then at most it has simply acquired and holds the right which the Somerset Railroad Company originally had to redeem the mortgage of July 1, 1871, which is a first mortgage upon said railroad property;

39 and that it has executed a second mortgage to Joseph R. Bodwell, E. F. Webb and Everett R. Drummond, upon the same property, to secure the payment of \$225,000 of second-mortgage bonds which it had a legal right to do if it was the lawful successor of the original Somerset Railroad Company.

12. These trustees say in answer to paragraph twelve, that upon the appointment of said Heath and Drew, as trustees under the mortgage of July 1, 1871, they found the railroad, rolling stock and other property of the Somerset Railroad Company, their mortgagors in the hands and control of John Ayer, Wm. M. Ayer, Abner R. Small, Horace W. Greely, W. S. Tobey, E. V. Manson, F. L. Powers, F. H. Pease, S. S. Chase, O. Allen, Frank Adams, Frank Merrill and D. S. Foster who were using the same in a manner hostile to said trustees and had been in unlawful possession of said railroad property as these trustees are informed for more than six years, controlling and appropriating the large yearly income, rents and profits of said Somerset Railroad Company amounting to more than \$25,000.00 per year, as said trustees are informed to their own use and benefit, and being simply trespassers and disseizors as against said trustees. And thereupon said trustees instituted writs of entry against said Ayer and others in Somerset and Kennebec counties to recover said property and the rents and profits thereof as they lawfully might do, and as it was their duty to do, for the benefit of the holders of the bonds issued under the mortgage of July 1, 1871, still outstanding and unpaid, amounting to upwards of \$100,000 as these trustees are informed and believe, with accumulated interest now amounting to more than that sum. And these trustees are advised and so aver that if said John Ayer and the other defendants in the writs of entry can show that the Somerset railway has a legal existence and holds the right to redeem the mortgage of July 1, 1871, and that said Ayer and others were the servants and agents of said railway, they can move the court at the trial of said writs of entry for the conditional judgments provided by law in suits upon mort-

gages, thus relieving themselves wholly from any liability to account to these trustees for the rents, profits and income received by them from said railroad property. So that they have a full, adequate and complete remedy at law, if they are entitled to any remedy whatever. If they cannot show that said Somerset railway is a legal organization and holds the right of redeeming said mortgage, and that they acted under its authority, then these trustees are advised that they are liable at law for the income and profits received by them from the railroad property aforesaid. And in either event, both parties have ample and adequate remedies at law and at law alone, and this bill in equity is wholly unnecessary and cannot be maintained.

13. In answer to paragraph thirteen these trustees say that the petitioners to the court for the appointment of said Heath and Drew as trustees in the place of said Lindsey and Holland were the owners of \$69,600 out of the \$110,000 of bonds supposed to be still outstanding and unpaid, issued under the mortgage of July 1, 1871, that these trustees brought said writs of entry against said John Ayer and others as trespassers and disseizors at the special request and direction of all of said petitioners, including the present defendants; and that said suits are brought to recover said railroad property not only for the benefit of the petitioners aforesaid, including said defendants, but for the benefit of the whole of the \$110,000 of bonds still outstanding, or so many of them as may prove to be still outstanding. They received specific instructions from the other petitioners to bring said writs of entry as well as from the defendants named in the present bill and acted under such instructions.

14. In answer to paragraph fourteen these trustees say that the mortgage of July 1, 1871 was duly recorded in Somerset and Kennebec counties immediately after it was executed and more than ten years before the attempted organization of the alleged Somerset railway. That the bonds secured by said mortgage did not become due until July 1, 1891, nearly eight years after the pretended formation of said Somerset railway. That the \$300,000 of bonds issued and actually sold, were sold in open market in, and outside of the State, as these trustees are informed and believe; and that the names of many of the purchasers and owners are still un-

41 known to said trustees and unknown, as they believe to the alleged stockholders, trustees and bondholders of the supposed Somerset railway. That all of the purchasers of these \$300,000 of bonds relied upon the security afforded them by the due execution of said mortgage of July 1, 1871, covering the property and franchises of said Somerset Railroad Company, and upon the record thereof in the proper counties; which said execution and record were full and legal notice not only to the general public, but to these complainants and to their trustees and bondholders as well, that the Somerset Railroad Company and its franchises, and road-bed, and rolling stock, and all its property then in existence, or afterwards acquired, were holden by the terms of said mortgage and by the law of the State for the payment of their bonds and coupons until the last bond and the last coupon should be paid. That

the mortgage of July 1, 1871, was a first mortgage upon all of said property, and that the security afforded to them, and vested in them, under and by force of said mortgage contract, could not be taken away, nor in the least degree impaired by any subsequent legislation until said bonds and coupons were paid, or the statute of limitations had attached to them, that this situation, and these facts, rendered it impossible for any holder of said bonds who had purchased the same in open market, to be guilty of any laches or wrong towards the supposed Somerset railway, or their trustees, or their bondholders; all of whom had notice of the existence of the first mortgage upon the property, and were bound to govern themselves accordingly.

The holders of the bonds of July 1, 1871, could not prevent any of the acts of the parties who undertook to organize the Somerset railway, whether legally or illegally. These trustees are informed and believe that many of such holders had no knowledge of any kind that any such organization had been attempted until long after the issue of the \$225,000 of new bonds by said alleged Somerset railway. And these trustees are advised that if every holder of every unpaid bond secured by the mortgage of July 1, 1871, had known all about the attempted formation of a new corporation by other parties holding bonds similar to his, he could, at most, suppose that such new corporation and its trustees and bondholders expected as second mortgagees to pay, and must pay off the other bondholders under the first mortgage before the second could attach to the property.

These trustees, therefore, deny that the trustees under said mortgage or any bondholder who purchased bonds secured by the mortgage of July 1, 1871, in open market and for their market value, before said bonds became due, on July 1, 1891, were or could in the nature of the situation be guilty of any laches towards the supposed Somerset railway or its trustees, or its bondholders.

His rights were secured by a first mortgage upon the property duly executed and recorded, of which said Somerset railway and its trustees and bondholders had full notice and knowledge from said record and they could in no event, claim any other or greater rights than as second mortgagees, as against these trustees and their codefendants.

15. In answer to paragraph fifteen these trustees say that they deny the legal existence of the alleged Somerset railway. They allege that the contract rights of all the parties to the mortgage of July 1, 1871, were fixed by the laws in force when said mortgage was executed. That no law of the State of Maine, then existing, authorized the organization of a new corporation in the manner here attempted. That the laws then existing formed a part of the mortgage contract and provided a mode by which said mortgage could be legally foreclosed, and a new company formed for the benefit of all the bondholders.

But no law then existed, and these trustees are advised and believe that no such law exists now, or ever existed in Maine, authorizing a part of the bondholders of any railroad company to form a

new company that shall supersede and set aside the security furnished by the original mortgage to those bondholders who take no part in the formation of such new company. They believe and aver that the rights of those bondholders who take no part in the formation of such company, are fixed by the mortgage contract, and can be affected in no way except by payment; that at most such new

43 company occupy the situation and have the rights of the original corporation, and must pay up all the outstanding bonds of other bondholders. They further aver that the attempted foreclosure of the mortgage of July 1, 1871, by bill in equity, and the alleged formation of the Somerset railway, were equally void as against these trustees and the unpaid bondholders; and that the parties and persons now usurping the control of the Somerset Railroad Company and its property are, as to them and the interests they represent simply trespassers and disseizers. That even if said alleged foreclosure by bill in equity had been valid its effect would have been to vest an absolute title in the trustees under said mortgage who would still continue to hold it for the benefit of the bondholders exactly as before; and that no part of said title could vest in said Somerset railway even if legally formed.

16. In reply to paragraph sixteen which seems to require a statement of the case, rather than an admission or denial of any fact, these trustees are advised by counsel that stripped of unnecessary allegations this suit is a conflict between second-mortgage bondholders and first-mortgage bondholders, brought by said second-mortgage bondholders in the name of the common mortgagor. They are so advised that at most, said Somerset railway, if legally existing and holding the right, as it alleges, of redeeming the first mortgage, is and must be, the common mortgagor subject to both mortgages, and that instead of bringing its bill to redeem said first mortgage, which these trustees are advised is the only suit in equity it could maintain, and offering to pay the amount due upon said first mortgage, this suit appears to be brought in its name in the interest of the second-mortgage bondholders who ask to have the first mortgage and the bonds secured by it set aside and annulled, and the bondholders compelled by order of this court to exchange and surrender their bonds for stock in the alleged new corporation which simply succeeds to the rights of the original mortgagor, the Somerset Railroad Company if it has any rights at all.

The statement of the case would seem as these trustees are advised to show its utter futility. It is simply asking the court to compel the first-mortgage bondholders to surrender the priority which their mortgage gives them upon the common property assuming that the Somerset railway has a legal existence, and that the second mortgage and the bonds issued under it are valid because executed by the common mortgagor.

44 These trustees are advised and therefore deny that the Somerset railway has any interest in such a question or that it can maintain any such suit. On the contrary they are advised and so aver that the object of this suit is to determine the validity of the bonds

issued under said second mortgage as against the bonds issued under the first mortgage, and that the trustees named in said second mortgage, Edmund F. Webb and Everett R. Drummond are not only necessary parties but the only parties capable of bringing such suit. And they object to the maintenance of this suit because said Webb and Drummond are not parties thereto.

These trustees having answered all the paragraphs in said bill of complaint, so far as they are advised it is material to answer, further say that they have no knowledge or information save by the plaintiff's bill that any of the bonds now owned by their codefendants were used in the attempted formation of the supposed Somerset railway, and they do not admit any of the allegations of said bill to that effect, but require proof thereof. At best, according to those allegations it would seem to be but an incomplete and unexecuted agreement, said bonds never having been surrendered or stock received in place of them. And these trustees are informed and believe that the present holders of said bonds, their codefendants, purchased said bonds in open market, as commercial paper, before they became due, and paid the full market value therefor, without the slightest notice or knowledge that they had ever been so used, or that any reason existed why they were not valid securities under the mortgage of July 1, 1871.

And there is no claim or allegation in said bill of complaint to the contrary.

And these trustees pray to be hence dismissed with their costs in this behalf most wrongfully sustained.

LEWIS PIERCE.
FRANKLIN M. DREW.
HERBERT M. HEATH.

45 STATE OF MAINE, }
County of Androscoggin, } ss :

On this seventh day of July, A. D. 1893, personally came Lewis Pierce, Herbert M. Heath and Franklin M. Drew and made oath that they had severally heard the foregoing answer read and that the same is true except as to those matters stated to be upon their information and belief, and that as to those matters they believe them to be true.

Before me—

DAVID D. STEWART,
Justice of the Peace.

(Answer of the Town of Anson.)

The Town of Anson by Theodore F. Paine, Orlando Walker and Hiram T. Emery its selectmen in answer to said bill of complaint deny that said town of Anson or any person or persons acting by, or under its authority "petitioned in writing requesting a meeting of the bondholders for the purpose of forming said new corporation," the alleged Somerset railway, and they deny that "on the 15th day of August, 1883, said inhabitants of said town of Anson at said

meeting of said bondholders, represented said bonds, amounting at that time to \$27,500, and duly voted to form said new corporation, viz., the Somerset railway," as alleged in said bill.

On the contrary said inhabitants of said town of Anson by their said selectmen aver that at no time or place did said town of Anson ever have, or take, any part whatever, or have any connection in any manner, with the alleged formation of said Somerset railway; and never authorized any person or persons, at any time or place to vote for them, upon their bonds, to form said alleged corporation. And they deny every allegation in said bill of complaint that said town of Anson ever had, at any time or place, any connection in any way or manner, with the alleged formation or organization of said supposed Somerset railway. And as to all the other allegations in said bill, they rely upon the answer of the trustees, Lewis Pierce, Herbert M. Heath and Franklin M. Drew, as a full defence to said bill and its allegations. And they deny all alleged laches and all pretence of any.

THEODORE F. PAINE,
H. T. EMERY,
ORLANDO WALKER,

Selectmen of the Town of Anson.

SOMERSET, ss:

JULY 6, 1893.

Personally appeared Theodore F. Paine, Hiram T. Emery and Orlando Walker personally known to me to be selectmen of the town of Anson, and made oath that they have read the foregoing answer and know the contents thereof, and that the same are true upon their information and belief.

Before me—

AUGUSTINE SIMMONS,
Justice of the Peace.

(Answer of William H. Moore.)

The answer of William H. Moore who says that he is the owner of bonds issued and sold by the Somerset Railroad Company under the mortgage of July 1, 1871, to the amount of \$300.00 with interest coupons attached amounting to about \$400.00 more; that said bonds were purchased by him in open market long before they became due, and that he paid the full market price of said bonds and bought them as commercial paper, without the least knowledge, notice, information or belief that said bonds or any of them were used at any time by any person in the formation or organization of the alleged Somerset railway, nor does he now believe that they or any of them were ever so used, but upon information and belief denies the same. And he claims the protection given by law to commercial paper, and prays to be dismissed with costs.

WM. H. MOORE.

47 SOMERSET, ss :

JULY 6, 1893.

Personally appeared Wm. H. Moore and made oath that he has read the above answer and that the same is true except the matters stated upon his information and belief, and that he believes those to be true.

Before me—

THEODORE F. PAINE.

*Justice of the Peace.**(Answer of Ben. S. Collins.)*

Answer of Ben. S. Collins who says that he was the owner of one bond issued and sold by the Somerset Railroad Company and as assignee of the estate of Thomas Gray & Son, held in said capacity \$1,200 more of said Somerset Railroad Company's bonds, but that at the time said bill in equity was brought he was not the owner nor possessor of any of said bonds having sold the same to William Atkinson of Anson, and further says that never to his knowledge had any of the parties who held said bonds at the time of the organization of the alleged Somerset railway taken any part in said organization. And further answering says he has no knowledge or information now, except from the allegation of the plaintiff's bill that any of said bonds were so used, and therefore denies the same and requires proof thereof. And not being the owner or possessor of any of said bonds at the time the plaintiff's bill in equity was brought, he prays to be dismissed with costs.

BEN. S. COLLINS.

SOMERSET, ss :

JULY 14TH, 1893.

Personally came Ben. S. Collins and made oath that he knows the contents of the above answer and that the same are true except as to those matters stated to be upon information and belief and as to those he believes them to be true.

Before me—

J. J. PARLIN,

Justice of the Peace.

48

(Answer of Benjamin Hilton.)

The answer of Benjamin Hilton who says that William H. Brown named in the complainant's bill, and himself were partners in keeping a hotel at North Anson in the county of Somerset for many years prior to the death of said Brown in the year 1889. That soon after July 1, 1871 said Brown and himself in order to aid in the building of the Somerset railroad from West Waterville to North Anson and Solon purchased at the market price \$3,000.00 of bonds issued and sold by the Somerset Railroad Company and secured by the mortgage executed by said company on July 1, upon the road, franchises and property then owned by said Somerset Railroad Com-

pany, or thereafter to be acquired. That at the time of the attempted formation of a new company called the Somerset railway, in 1883, the said Brown and himself, each being then the owner of one-half of said bonds, distinctly agreed between themselves that none of said bonds should be put into said new company; as we feared and believed that it would operate as a confiscation of said bonds, and that we should lose our security under the mortgage of July 1, 1871. He further says that said \$3,000.00 of bonds were always kept in the safe in the hotel and were never carried away from said safe by said Brown to his knowledge or belief at any time; and were never put into said company by said Brown to his knowledge or belief. That at no meeting of bondholders on July 11, 1883, or Aug. 15, 1883, at West Waterville, did said Brown have said bonds in his personal possession to the knowledge or belief of this defendant, nor did he have any authority from this defendant in any way to use said bonds in the formation of said new company, or to receive any stock in such new company for said bonds, or in exchange for said bonds. And said defendant denies that said Brown ever received, to his knowledge, information or belief, any such stock for said bonds. If he did, it was wholly without authority and contrary to his express agreement with said Hilton, who never had any knowledge or information of any attempt by said Brown to use said bonds in the formation of said new company until the service of the bill in the present suit. As to the

49 allegations in said bill that said Brown attended the meetings of July 11, and Aug. 15, 1883, or any other meetings set out in said bill, or was knowingly elected a director in said new company at any time said Hilton has no knowledge and requires proof thereof if the facts are of any importance.

He further adds that he has no personal knowledge as to the remaining allegations of said bill, and relies on the answer filed by the trustees under the mortgage of July 1, 1871, as a complete answer thereto, and asks to be dismissed with costs.

BENJ. HILTON.

SOMERSET, ss :

AUG. 10, 1893.

Personally came Benjamin Hilton and made oath that he has read the above answer and that the same is true of his own knowledge, except those matters stated to be upon his information and belief and that as to those matters, he believes them to be true.

Before me—

THEODORE F. PAINE,
Justice of the Peace.

(Answer of Wm. Atkinson.)

The answer of William Atkinson, one of said defendants, who says that he is the owner of bonds of the Somerset Railroad Company, issued and sold under the mortgage of July 1, 1871, to the amount of \$5,500.00 with interest coupons attached amounting to

about \$7,000.00 more. That he purchased said bonds before they became due in open market, as commercial paper, and paid the full market value thereof at the time of said purchase which was made of various persons; and that at the time of said purchases of said bonds he had no notice, knowledge, information or belief, that said bonds or any of them, ever had been used by former owners in the formation of the Somerset railway, or that said bonds or any of them, ever had any connection with the formation or organization of said Somerset railway or had been used therein, or therefor by any person in any way or manner. As to the other allegations of said bill of complaint, he relies upon the answer of the trustees, Lewis Pierce, Herbert M. Heath and Franklin M. Drew as a full defence thereto; and upon his information and belief, he alleges said answer to be true, and adopts it as his own.

WM. ATKINSON.

SOMERSET, ss :

JULY 6, 1893.

Personally came William Atkinson, above named, and made oath that he has heard the above answer read and knows the contents thereof and that the same is true, except as to those matters stated to be upon his information and belief, and that as to those he believes them to be true.

Before me—

BENJAMIN ADAMS,
Justice of the Peace.

(Answer of T. H. Spaulding.)

The answer of T. H. Spaulding called in said bill Tileston H. Spaulding, who says that he owns \$700.00 of bonds issued and sold by the Somerset Railroad Company under the mortgage of July 1, 1871, with coupons for interest attached for more than \$800.00; that he purchased said bonds before they became due, in open market, as commercial paper, and paid the full market value thereof at the time of said purchase; and that he had, at said time of said purchase, no knowledge, information, or notice or belief that said bonds were ever used by any person, or by any former owner, in the formation or organization of the Somerset railway; and he has no knowledge or belief now that they were ever so used; and upon information and belief he denies that they were ever so used. And he claims the protection given to *bona fide* purchasers of negotiable paper, and to be hence dismissed with costs.

TILESON H. SPAULDING.

SOMERSET, ss :

JULY 6TH, 1893.

Personally came T. H. Spaulding and made oath that he has read the above answer and that the same is true except those matters

stated upon information and belief and that as to those matters he believes them to be true.

Before me—

THEODORE F. PAINE,
Justice of the Peace.

51

(*Answer of Alonzo Garcelon.*)

This defendant says that he has read and knows the contents of the answer of Lewis Pierce, Herbert M. Heath and Franklin M. Drew, trustees, filed in this case, and he adopts the same as part of his answer without repeating and to save repeating here; and he insists upon the same objections to the maintenance of this suit as are there set forth. Further answering, he says that he is the owner of \$6,700.00 of bonds issued and sold by the Somerset Railroad Company under the mortgage of July 1, 1871, with interest coupons attached amounting to upwards of \$8,000.00 more. That he purchased said bonds before they were due, in open market, as commercial paper, and paid the full market price and value for them, without the slightest notice, knowledge, information or belief that they, or any of them, had ever been used by any person in any way in the formation or organization of the Somerset railway, or that for any reason whatever they were not valid and subsisting securities under the mortgage executed by the Somerset Railroad Company on July 1, 1871, to secure their payment; and that he purchased them relying wholly upon the belief that they were so secured.

And he prays to be hence dismissed with costs.

ALONZO GARCELON.

ANDROSCOGGIN, ss :

JULY 7, 1893.

Personally came Alonzo Garcelon and made oath that he has heard the above answer read and also the answer of Lewis Pierce, Herbert M. Heath and Franklin M. Drew, trustees in this same suit, and knows their contents, and as to the matters stated in his answer that they are true, and as to those stated in the answer of said Pierce, Heath and Drew, he believes them to be true.

Before me—

DAVID D. STEWART,
Justice of the Peace.

52

(*Answer of T. R. Herbest.*)

The answer of T. R. Herbest, one of said defendants, who says that he is the owner of \$6,000.00 of bonds issued and sold by the Somerset Railroad Company under the mortgage of July 1, 1871, with coupons for interest attached amounting to upwards of \$7,000.00 more; that he purchased said bonds in the open market, before they became due, and paid the full market price and value thereof without the slightest knowledge, notice, information or belief that said

bonds had been used by any former owner, or by any person whatever, in the formation or organization of the Somerset railway; and he has now no such information except from the plaintiff's bill and does not admit but denies the allegation therein. He claims the protection given by law to the purchaser of commercial paper and asks to be dismissed with costs.

T. R. HERBEST.

PENOBSCOT, 88 :

JULY 15, 1893.

Personally came T. R. Herbest and made oath that he has heard the above answer read and that the same is true except as to those matters stated upon information and belief, and those he believes to be true.

Before me—

HERBERT C. BEAN,
Justice of the Peace.

(Answer of C. I. Barker.)

The answer of C. I. Barker who says that he is the owner of \$4,900.00 of bonds secured by the mortgage of July 1, 1871, with interest coupons attached for about \$5,000.00 more; that he purchased said bonds in the open market, as commercial paper, before they became due, and paid for them the full market price and value, without the slightest knowledge, notice, information or suspicion that they or any of them, had been used by any former owner, or by any other person, in the formation or organization of the
53 Somerset railway; or that they had ever had any connection in any way or manner in or with the organization of said railway, and he does not admit but denies that they were ever so used as alleged in the plaintiff's bill. He claims the protection given by law to negotiable paper purchased for value before due, in the open market, and asks to be dismissed with costs.

C. I. BARKER.

ANDROSCOGGIN, July 7, 1893.

Personally came C. I. Barker and made oath that he has heard the above answer read and that the same is true except such matters as are stated upon information and belief, and those he believes to be true.

Before me—

DAVID D. STEWART,
Justice of the Peace.

(Answer of J. M. Robbins.)

The answer of J. M. Robbins who says that he is the owner of \$13,175.00 of bonds issued by the Somerset Railroad Company under the mortgage of July 1, 1871, with interest coupons attached amounting to upwards of \$16,000.00 more, \$3,200.00 of which said

bonds he holds as trustee, and \$9,775.00 in his own right. That he purchased all of said bonds in open market as commercial paper, before they became due, as secured by said mortgage, and paid the full market value and price thereof, out of trust funds in his hands, and with his own moneys, without the slightest knowledge, notice, information or suspicion that said bonds, or any of them, had ever been used by any former owner, or by any person whatever at any time or place, in the formation or organization of the Somerset railway, and he has now no information except by the plaintiff's bill that said bonds were so used; and he does not admit, but denies such allegation.

He further says that he bought said bonds in the full belief that they were secured by said mortgage of July 1, 1871, and in reliance upon such security, and he claims the protection given
54 by the law to purchasers of negotiable paper, for value in the open market, before due, and in good faith, and asks to be hence dismissed with costs.

J. M. ROBBINS.

ANDROSCOGGIN, ss :

JULY 7, 1893.

Personally came J. M. Robbins and made oath that he has heard the above answer read and that the same is true of his own knowledge except as to such matters as are stated upon information and belief, and that those matters he believes to be true.

Before me—

DAVID D. STEWART,
Justice of the Peace.

(Answer to Webb and Drummond.)

And now said respondents Edmund F. Webb and Everett R. Drummond, trustees, as described in paragraph eight of the complainants' bill of complaint come and for answer say that they admit all the allegations of said bill of complaint and are willing that the complainants shall have the relief prayed for therein.

EDMUND F. WEBB,
EVERETT R. DRUMMOND.

EVERETT R. DRUMMOND, *Solicitor.*

(Replication.)

The plaintiff says its bill is true, and the several answers of said defendants are not true; and this it is ready to prove.

SOMERSET RAILWAY,
By WEBB, JOHNSON & WEBB,
Its Solicitors.

55

(Report of Evidence.)

Plaintiff offers in evidence, mortgage from Somerset Railroad Company to Lewis Pierce *et als.*, dated July 1st, 1871, and printed as "Exhibit A" to said bill.

Plaintiff also offers in evidence the stenographer's report of the evidence of E. C. Wellman, called as a witness for the petitioners in suit Inhabitants of Anson and others, petitioners for the appointment of trustees, supreme judicial court, Kennebec county, in equity, as follows:

E. C. WELLMAN, called by the petitioners, testified:

I am treasurer of the People's savings bank, Lewiston. There are in my bank \$17,900 of these old Somerset Railroad Company bonds, on this list. We hold them as security.

Ques. Now as whose property do you hold those bonds as security?

Ans. Partly Mr. Robbins', partly Mr. Barker's, partly Mr. Herbest's and partly Dr. Garcelon's. What the division is of course I do not know. I have a list here of the bonds, their numbers and amounts which I drew off myself.

The following are the numbers and amounts of bonds held by C. I. Barker:

Numbers 112, \$500; 169, \$100; 246, \$100; 250, \$100; 251, \$100; 252, \$100; 254, \$100; 292, \$100; 330, \$100; 355, \$100; 356, \$100; 424, \$100; 445, \$100. Total, \$1,700.

The following are the numbers and amounts of the bonds held by the People's savings bank as collateral security for a note given by Alonzo Garcelon, J. M. Robbins, I. C. Barker and T. R. Herbest:

Numbers 4, \$1,000; 6, \$1,000; 8, \$1,000; 9, \$1,000; 10, \$1,000; 11, \$1,000; 12, \$1,000; 13, \$1,000; 14, \$1,000; 15, \$1,000; 16, \$1,000; 50, \$1,000; 89, \$100; 107, \$500; 108, \$500; 109, \$500; 113, \$500; 114, \$500; 115, \$500; 116, \$500; 117, \$500; 118, \$500; 119, \$500; 120, \$500; 193, \$100; 239, \$100; 259, \$100. Total, \$17,900.

56 The following are the numbers and amounts of bonds held by Alonzo Garcelon:

Numbers 149, \$500; 95, \$100; 90, \$100; 50, \$100; 16, \$100; 15, \$100; 277, \$100; 69, \$100; 34, \$100; 329, \$100; 242, \$100; 178, \$500. Total, \$2,000.

The following are the numbers and amounts of bonds held by John M. Robbins as trustee:

Numbers 4, \$500; 66, \$500; 98, \$500; 307, \$100; 301, \$100; 360, \$100; 359, \$100; 358, \$100; 391, \$100; 47, \$100; 99, \$100; 392, \$100; 363, \$100; 362, \$100; 361, \$100; 302, \$100; 12, \$100; 241, \$05; 112, \$100; 104, \$100. Total, \$3,200.

The following are the numbers and amounts of bonds held personally by John M. Robbins:

Numbers 35, \$500; 184, \$100; 17, \$100; 42, \$100; 201, \$100; 185, \$100; 354, \$1,000; 7, \$1,000; 45, \$1,000; 2, \$1,000; 5, \$1,000; 106, \$500; 20, \$100. Total, \$6,600.

The following are the numbers and amounts of the bonds of William Atkinson:

Numbers 47, \$1,000; 191, \$100; 240, \$100; 10, \$100; 291, \$100; 46, \$1,000; 49, \$1,000; 192, \$100; 110, \$500; 89, \$100; 86, \$100; 243, \$100; 255, \$100; 299, \$100. Total, \$4,500.

The following are the numbers and amounts of bonds held by T. R. Herbest:

Numbers 111, \$500; 36, \$500; 70, \$100; 353, \$100; 3, \$1,000; 49, \$100; 33, \$100; 88, \$100; 52, \$100; 92, \$100. Total, \$2,700.

Counsel for petitioners placed in evidence certificate of stock number 79 for eight hundred shares, running to the town of Anson, dated at West Waterville, July 31st, 1878.

The following are the numbers and amounts of bonds held by the town of Anson:

Numbers 198, \$500; 200, \$500; 82, \$500; 83, \$500; 84, \$500; 85, \$500; 86, \$500; 87, \$500; 88, \$500; 165, \$500; 166, \$500; 167, \$500; 168, \$500; 169, \$500; 170, \$500; 171, \$500; 173, \$500; 181, \$500; 182, \$500; 183, \$500; 184, \$500; 185, \$500; 186, \$500; 187, \$500; 188, \$500; 190, \$500; 192, \$500; 193, \$500; 197, \$500; 57 195, \$500; 196, \$500; 194, \$500; 5, \$500; 334, \$100; 335, \$100; 336, \$100; 337, \$100; 400, \$100; 401, \$100; 402, \$100; 404, \$100; 409, \$100; 407, \$100; 406, \$100; 405, \$100; 403, \$100; 408, \$100; 333, \$100; 207, \$1,000; 204, \$1,000; 202, \$1,000; 203, \$1,000; 139, \$1,000; 138, \$1,000; 201, \$1,000; 205, \$1,000; 206, \$1,000. Total, \$27,000.

Plaintiff also offers in evidence abstracts from the records of the stockholders of the Somerset railway (pp. 1-48, inclusive), as follows:

"Somerset Railroad Company.

Whereas the Somerset Railroad Company, a corporation created by the laws of the State of Maine, on the first day of July, A. D. 1871, mortgaged its railroad from its junction with the Maine Central railroad in Waterville (now Oakland), in the county of Kennebec, to its terminus at Solon, in the county of Somerset and situated in said counties of Kennebec and Somerset, with the franchise of said company and all its property to Lewis Pierce of Portland, in the county of Cumberland, Daniel Holland of Lewiston, in the county of Androscoggin, and Stephen D. Lindsey of Norridgewock, in the county of Somerset, as trustees for the holders of the bonds hereinafter described, to secure bonds of said company, bearing the same date to an amount not exceeding five hundred thousand dollars, payable in twenty years from said first day of July, A. D. 1871, with interest at the rate of seven per cent. per annum, payable semi-annually according to the coupons annexed to each bond.

And, whereas, said company issued and sold its said bonds, secured by said mortgage, to the amount of four hundred and fifty thousand dollars, which are still outstanding.

And, whereas, no interest has been paid on said bonds for more than three years,

The undersigned, the holders of said bonds to an amount exceeding one-half of the same, hereby elect to form a new corporation, composed of said holders, in the manner provided in the fifty-first chapter of the Revised Statutes and acts additional thereto and amendatory thereof.

58 And hereby give notice that a meeting of the holders of said bonds will be holden at Memorial hall, in Oakland, in the county of Kennebec, on the fifteenth day of August, A. D. 1883, at ten o'clock in the forenoon for the following purposes, viz:

1. To see if the holders of said bonds will determine to form a corporation as provided by law.

2. To adopt a code of by-laws for such corporation.

3. To elect a board of directors for such corporation.

4. To take such measures as may be deemed expedient and necessary to secure the objects for which such corporation shall be formed.

Dated this eleventh day of July, A. D. 1883.

REUBEN B. DUNN.

DUNN EDGE TOOL COMPANY,

By R. B. DUNN, *President*.

JOHN AYER.

S. S. THOMPSON.

F. W. HILL.

JOHN HEALD.

THE INHABITANTS OF NORRIDGEWOCK,

By C. A. HARRINGTON,

E. W. TOBEY,

Selectmen.

F. J. WATTS.

B. P. J. WESTON.

W. H. BROWN.

INHABITANTS OF ANSON,

By EDWIN COLLINS,

W. W. PEASE,

Selectmen of Anson.

I hereby certify that at the request of the signers of the foregoing notice I caused the same to be published three weeks successively in the State paper and in a paper published in the county of Somerset, and in a paper published in the county of Kennebec, in which counties said railroad lies, the last publication in each of said papers being more than one week before the time therein named for said meeting, viz: In the Kennebec Journal, (the

59 State paper) published on the — and — days of July and — day of August, 1883, and in the Union Advocate, published in the county of Somerset on the eighteenth day of July, and the twenty-fifth day of July, and on the first day of August, A. D. 1883, and in the Sentinel, published in the county of Kennebec, on the twentieth and twenty-seventh days of July, and third day of August, A. D. 1883.

JOSIAH H. DRUMMOND.

CUMBERLAND, ss :

AUGUST 14, 1883.

Then personally appeared the above-named Josiah H. Drummond, and made oath that the above certificate subscribed by him is true.

Before me—

JOSIAH H. DRUMMOND, JR.,

Justice of the Peace.

Pursuant to the foregoing notice, published as aforesaid, the holders of the bonds of the Somerset Railroad Company described in said notice, met at Memorial hall, in Oakland, in the county of Kennebec, on Wednesday, the fifteenth day of August, A. D. 1883, at ten o'clock in the forenoon.

They were called to order by Josiah H. Drummond, and Hon. Stephen D. Lindsey was elected moderator; and Edward Rowe was elected clerk of the meeting and was duly sworn by Stephen D. Lindsey, Esq., justice of the peace.

On motion of Mr. Drummond, Messrs. Josiah H. Drummond, Edward Collins and Francis W. Hill, were appointed a committee to examine and report the names of the bondholders present in person or by proxy, with the amount of bonds held by each and the amount held by the signers of the agreement to form a corporation and the notice of this meeting.

The committee having attended to this duty, reported as follows:

The whole amount of bonds presented by your committee by holders or their proxies (not reckoning overdue coupons) is \$354,600.

60 Presented as follows:

Sumner S. Thompson, by Josiah H. Drummond, proxy, twenty-one \$1,000 bonds, Nos. 2 to 16 and 45 to 50.....	\$21,000
Fifteen \$500 bonds, Nos. 106 to 120.....	7,500
Three \$100 bonds, Nos. 50, 89, and 239.....	300
Total.....	\$28,800

Inhabitants of Norridgewock.

Thirty \$1,000 bonds, Nos. 98 to 127.....	30,000
Total.....	30,000

Inhabitants of Anson.

Nine \$1,000 bonds, Nos. 5, 138, 139, and 201 to 207, inc.....	\$9,000
Thirty-four \$500 bonds, Nos. 82 to 88, 165 to 171, 173, 181 to 190, 192 to 198, and 200....	17,000
Fifteen \$100 bonds, Nos. 333 to 337 and 400 to 409.....	1,500
Total.....	27,500

Francis W. Hill.

Ten \$1,000 bonds, Nos. 1, 27.....	\$10,000
Three \$100 bonds, Nos. 127, 264, and 265.....	300
Total.....	10,300

Reuben B. Dunn.

Ten \$1,000 bonds, Nos. 22, 29 to 34, 97, 140, 257.....	\$10,000	
Thirty \$500 bonds, Nos. 13 to 20, 26 to 34, 135 to 147.....	15,000	
Thirty-five \$100 bonds, Nos. 8, 44, 46, 53, 97, 98, 138, 139, 141, 142, 145, 146, 148, 151, 153 to 164, 181, 197, 198, 217, 220, 225, 231, 232, 285	3,5000	
Total		28,500

61

William H. Brown.

Five \$500 bonds, Nos. 128, 131 to 134.....	\$2,500	
Sixteen \$100 bonds, Nos. 21 to 30, 61 to 64, 236, 237, 448, 449.....	1,600	
Total.....		4,100

B. P. J. Weston.

Twenty-three \$100 bonds, Nos. 31, 122 to 124, 126, 227 to 229, 234, 303, 308, 311, 314, 318, 320, 323, 379, 380, 399, 428 to 430, 443.....	\$2,300	
Total		2,300

Nathan Weston.

Ten \$100 bonds, Nos. 438 to 442, 461 to 465....	\$1,000	
Total		1,000

Nathan Wood.

Three \$100 bonds, Nos. 304, 305, and 317.....	\$300	
Total.....		300

R. Wesley Dunn.

Five \$100 bonds, Nos. 43, 147, 149, 150, 152..	\$500	
Total		500

John Ayer.

Two \$1,000 bonds, Nos. 28 and 35	\$2,000	
Total		2,000

Dunn Edge Tool Company.

One hundred and seventy-seven \$1,000 bonds, Nos. 24, 36 to 44, 59, 61 to 88, 142, 151 to 200, 208 to 250, 256, 258 to 300.....	\$177,000	
Fifty-eight \$500 bonds, Nos. 6 to 9, 37 to 65, 67 to 71, 90, 93 to 97, 100, 122, 126, 127, 130, 155, 156, 159 to 162, 164, 191, 199.....	29,000	
Eighty-five \$100 bonds, Nos. 131 to 133, 140, 143, 175, 176, 180, 188, 202, 222, 223, 266 to 268, 297, 300, 357, 364, 366, 367, 375, 376, 381 to 389, 394, 415 to 421, 447, 450 to 458, 466 to 500.....	8,500	
Total		214,500

62	<i>Edward Rowe.</i>	
One \$500 bond, No. 157	\$500	
Three \$100 bonds, Nos. 51, 80, 353.....	300	
Total		800

Stephen D. Lindsey.

One \$100 bond, No. 355	\$100	
Total		100

John Heald.

Three \$500 bonds, Nos. not given.....	\$1,500	
Twenty-four \$100 bonds, Nos. not given.....	2,400	
Total		3,900
Total amount represented.....		\$354,600

They also find that the signers of the agreement to form a corporation, held at the time of the signing thereof and continued to hold and now hold \$351,900 in amount of the bonds described in the call, besides F. J. Watts, who is not present and the amount of whose bonds is not known to the committee.

JOSIAH H. DRUMMOND,
EDWARD COLLINS,
F. W. HILL,
Committee.

On motion of Mr. Brown of Anson, the report was accepted.

Mr. Drummond offered the following preamble and resolution, which were unanimously adopted:

Whereas, no interest upon the bonds issued by the Somerset Railroad Company, secured by mortgage and dated the first day of July, A. D. 1871, has been paid for more than three years:

And, whereas, the holders of said bonds, to an amount exceeding one-half of the same, have elected in writing to form a new corporation in the manner provided by law with the rights and powers of the corporation under its charter :

And, whereas, notice of this meeting has been given by publishing the foregoing notice three weeks successively in the State
63 paper and in a paper printed in each county in which said railroad lies, the last publication in each paper being one week at least before the time named therein for said meeting :

Voted, that the bondholders aforesaid organize a new corporation as provided by law under the name of the Somerset railway.

Upon motion of Mr. Harrington of Norridgewock the following code of by-laws was unanimously adopted :

ARTICLE I.

Meetings—How Called.

All meetings of the bondholders shall be held at such place as the directors for the time being shall appoint and shall be called by a notification published two weeks successively in two at least of the public newspapers printed in this State, the first publication to be fourteen days at least before the day of such meeting. Said notification shall specify the time and place of meeting and the objects for which the meeting is called and shall be signed by the president or clerk of the corporation. No other business shall be transacted at any special meeting of the bondholders but such as relates to the objects specified in the notification.

ARTICLE II.

Meetings—Business at.

No business shall be transacted or votes passed at any meeting of the bondholders, excepting a vote to adjourn to some future time unless there be present in person or by proxy bondholders holding and representing not less than one-fifth of the whole amount of bonds outstanding.

ARTICLE III.

Meetings—How Ordered.

The time and place of all meetings of the bondholders, excepting the time of the annual meeting, shall be determined by the directors. The first annual meeting shall be held on the second
64 Wednesday of November, A. D. 1884, at ten of the clock in the forenoon and on the second Wednesday of November in each year hereafter.

Special meetings may be ordered by the directors when they deem it expedient. It shall also be the duty of the directors to order a special meeting whenever requested on the written appli-

cation of bondholders owning not less than one-twentieth of the whole amount of the bonds outstanding.

ARTICLE IV.

Manner of Voting.

Questions coming before the bondholders at any of their meetings, may by common consent be decided by hand vote.

If any bondholder dissents from adopting that mode, the question shall be resolved by ayes and noes, by ballot, voting by bonds. In all cases of voting by bonds, the ballot shall have written on the back thereof, the amount of bonds, which the person owns or represents, authenticated by the signature of the person throwing the ballot; and in case the voter acts as proxy, he shall subjoin to his signature that fact and the name of his principal. No ballot unless so authenticated, shall be counted.

ARTICLE V.

Directors—Their Number and Qualifications.

The board of directors shall consist of not exceeding eleven members, who shall hold their offices until others shall have been duly elected to fill their places, of whom not less than a majority of the whole number shall always be resident citizens of Maine, and each member of the board must be, at the time of his election, a bondholder.

Whenever any director, having been a resident citizen of Maine, at the time of his election, shall remove out of the State, and when any director shall cease to be a bondholder his office may thereby become vacant. Whenever any vacancy shall happen in the board of directors, it may be filled by the other directors, or by a new election, and a special meeting of bondholders may be called for that purpose, if the remaining directors so determine.

65

ARTICLE VI.

Clerk and His Duties.

The clerk shall be chosen by the board of directors. He shall, *ex officio*, be clerk of the bondholders. He shall keep a fair record of all the doings of the bondholders, at their meetings, in a separate book kept for that purpose. He shall also keep in a separate book a record of the doings of the directors at any of their meetings, particularly stating the names of those present at such meeting.

The tenure of office of the clerk, shall be during the pleasure of the directors. In his absence, the directors shall choose a clerk *pro tempore*, who shall perform his duties during such absence.

ARTICLE VII.

Powers and Duties of Directors.

The directors may establish rules for the proper regulation of their own proceedings, and the orderly performance of their duties.

They shall fix and determine the compensation of their officers and agents. They may erect such buildings, storehouses, wharves and workshops, as they may deem advantageous and for the interest of the company.

They may sell and dispose of any real estate or personal property belonging to the company, whenever, in their opinion, the interest of the company would be best promoted thereby. They shall have authority to lease any real estate belonging to the company, on such terms as they may judge best.

They may authorize the treasurer to hire such sums of money, on the credit and for the use of the company, as they may deem necessary to carry out the intentions and objects of the charter, and may give such security for the payment thereof as they may deem reasonable.

They shall declare all dividends, allow accounts, adjust and settle all just and equitable claims upon the corporation, superintend the conduct and doings of the different officers and agents appointed or employed by them and take all necessary measures to carry into effect the objects and purposes of the company as defined and prescribed by their charter.

ARTICLE VIII.

Treasurer and His Duties.

The treasurer chosen by the directors shall hold his office during their pleasure. He shall have an office in such place as the directors shall determine, accessible to all persons having business with the corporation or any of its officers or agents. He shall keep all deeds, promissory notes and valuable papers of the company. He shall collect and receive all assessments, income and moneys that may be due to the company, and disburse the same as the board of directors shall order. He shall surrender notes and other promissory papers on payment thereof, and discharge such mortgages as may have been given concerning the same. He shall keep a regular set of books containing the accounts of the company, and of all funds that may pass through his hands. He shall lay before the directors, a written statement of all notes, drafts, promises and contracts made, signed and endorsed, or surrendered by him, an abstract of money received or paid by him, a statement of all property bought and sold, and such other matters as he or the board of directors may deem important, when called for. He shall make a complete settlement of the accounts and books, at least annually, and as much oftener as the board of directors shall require and shall advise what dividends of profits shall be made. He shall render an account of his doings to the bondholders at their annual

meeting. He shall notify the bondholders of all assessments in the manner prescribed by the by-laws. He shall deposit to his credit, as treasurer of the Somerset railway and in such banks as the directors may from time to time designate, all moneys received by him. He shall attend faithfully to the duties prescribed in the by-laws, and to all other duties which the directors may require him to perform.

ARTICLE IX.

Common Seal.

67 This company shall have a common seal, to be preserved and kept by the treasurer, bearing the words and figures, "Somerset railway, organized August 15, 1883."

ARTICLE X.

Deeds—How Executed.

All deeds, conveyances and mortgages, which shall be made in fee-simple, or for any other or less estate, when authorized by a vote of the directors and all leases of any real estate owned by said company, executed and acknowledged by the president, countersigned by the treasurer and authenticated by the seal of said company, are hereby declared to be the acts and deeds of said company, and shall be valid and effectual as such, to all intents and purposes.

ARTICLE XI.

By-laws—How Amended.

These by-laws may be altered, restrained, amended or repealed at any meeting at which there shall be present, in person or by proxy, bondholders, holding and representing at least one-fifth of the amount of bonds outstanding, notice having been given in the call.

On motion of Reuben B. Dunn—

Voted, that the board of directors for the ensuing year be fixed at nine.

Voted, to proceed to the choice of directors, and Messrs. Hill, Brown and R. W. Dunn, were appointed a committee to receive, sort and count the votes.

The committee having attended to that duty reported as follows :

Whole number of votes	3,540
Necessary for a choice.....	1,771
John Ayer, has.....	3,540
Reuben B. Dunn, has	3,540
Sumner S. Thompson, has.....	3,540
Stephen D. Lindsey, has.....	3,540
Francis W. Hill, has.....	3,540
R. Wesley Dunn, has	3,540
Edward Rowe, has	3,540
Nathan Weston, has	3,540
William H. Brown, has	3,540

68 And thereupon Messrs. Ayer, Dunn, Thompson, Lindsey, Hill, Dunn, Rowe, Weston, and Brown were declared duly elected directors for the ensuing year.

Voted, that the officers of the corporation be instructed to take possession of the railroad and other mortgaged property on the first day of September next and thereafter operate the railroad for the benefit of this corporation.

Voted, that the directors be authorized and requested to purchase the equity of redemption in the railroad and take a conveyance thereof, to this corporation, if it can be done on reasonable terms.

Voted, to adjourn.

Attest :

EDWARD ROWE, *Clerk.*

1884, NOVEMBER 12.

Bondholders' Annual Meeting.

(The following is one of the copies of the printed newspaper notice pasted on page 18:)

Somerset railway.

The annual meeting of the bondholders of the Somerset railway, will be held in Memorial hall, Oakland, on Wednesday, the twelfth day of November next, at ten o'clock in the forenoon.

1st. To fix the number of, and make choice of a board of directors for the ensuing year.

2nd. For the transaction of any other business that may be legally brought before them.

Per order of the directors.

EDWARD ROWE, *Clerk.*

NORRIDGEWOCK, *October 27th, 1884.*

The foregoing notice was published three weeks successively in the Union Advocate, a newspaper published in Anson, in the county of Somerset, and the Waterville Sentinel, a newspaper published in Waterville, in the county of Kennebec; the first publication being fourteen days before the day of said meeting.

A true record.

Attest :

EDWARD ROWE, *Clerk.*

69 Pursuant to the foregoing notice, the bondholders met at the time and place appointed, and the meeting was called to order by the president.

The record of the call for the meeting was read by the clerk.

On motion of Mr. N. Weston, that this meeting be adjourned four weeks.

Voted, that this meeting now adjourn to meet at this place Wednesday, December 10, 1884, at 10 o'clock, a. m.

Voted, to adjourn.

Attest :

EDWARD ROWE, *Clerk.*

MEMORIAL HALL, OAKLAND,
WEDNESDAY, December 10, 1884.

Bondholders met as per adjournment, 10 a. m. Meeting called to order by the president. Record of the call for the meeting was read by the clerk. Report of the treasurer and superintendent, and certificate of J. B. Bradbury, accountant, were read by the president, accepted and ordered on file.

Voted, on motion of R. B. Dunn, number of directors be nine (9).

Voted, that A. R. Small, J. J. Parlin and R. W. Dunn, be the committee to receive, sort and count the votes for directors.

The committee having attended to that duty, reported as follows:

Whole number of votes.....	3,278
R. B. Dunn, has.	3,278
John Ayer, has.	3,278
Edward Rowe, has.	3,278
S. S. Thompson, has.	3,278
F. W. Hill, has.	3,278
R. W. Dunn, has.	3,278
Wm. H. Brown, has.	3,278
Nathan Weston, has.	3,278
C. A. Harrington, has.	3,278

And thereupon Messrs. R. B. Dunn, Ayer, Rowe, Thompson, Hill, R. W. Dunn, Brown, Weston and Harrington, were declared duly elected directors for the ensuing year.

Voted, to adjourn.

Attest:

EDWARD ROWE, *Clerk.*

70 (The following is one of the copies of the printed newspaper notice, pasted on page 20.)

1885, NOVEMBER 11.

Bondholders' Annual Meeting.

Somerset railway.

The annual meeting of the bondholders of the Somerset railway, will be held in Memorial hall, Oakland, on Wednesday, the eleventh day of November next, at ten o'clock in the forenoon.

1st. To fix the number of, and make choice of a board of directors for the ensuing year.

2nd. For the transaction of any other business that may be legally brought before them.

Per order of the directors.

EDWARD ROWE, *Clerk.*

NORRIDGEWOCK, October 26, 1885.

The foregoing notice was published three weeks successively in the Union Advocate, a newspaper published in Anson, in the county of Somerset, and the Waterville Sentinel, a newspaper published in

Waterville, in the county of Kennebeck; the first publication being fourteen days before the day of said meeting.

A true record.

Attest:

EDWARD ROWE, *Clerk.*

Pursuant to the foregoing notice, the bondholders met at the time and place appointed, and the meeting was called to order by the president.

The record for the call of the meeting was read by the clerk.

The expense and earnings of the road were read by the president, accepted and ordered to be put on file.

Voted, on motion of R. B. Dunn, the number of directors be seven.

Voted, that A. R. Small, C. H. Hussey, John Tinkham, be the committee to receive, sort and count the votes for directors.

71 The committee having attended — that duty, reported as follows:

Whole number of votes.....	3,075
R. B. Dunn, has	3,075
John Ayer, has	3,075
Edward Rowe, has	3,075
R. W. Dunn, has.	2,773
Wm. H. Brown, has.....	3,075
Nathan Weston, has....	3,075
F. W. Hill, has	3,027

And thereupon Messrs. R. B. Dunn, Ayer, Rowe, R. W. Dunn, Brown, Weston and Hill, were declared duly elected directors for the ensuing year.

Voted, to adjourn.

Attest:

EDWARD ROWE, *Clerk.*

1886, NOVEMBER 10.

Bondholders' Annual Meeting.

(The following is one of the copies of the printed newspaper notices pasted on page 22.)

Somerset railway.

The annual meeting of the bondholders of the Somerset railway, will be held in Memorial hall, Oakland, on Wednesday, the tenth day of November next, at ten o'clock in the forenoon.

1. To fix the number of and make choice of a board of directors for the ensuing year.

2. For the transaction of any other business that may be legally brought before them.

Per order of the directors.

EDWARD ROWE, *Clerk.*

NORRIDGEWOCK, Oct. 22, 1886.

The foregoing notice was published three weeks successively in the Union Advocate, a newspaper published in Anson, in the county of Somerset, and the Waterville Sentinel, a newspaper published in Waterville, in the county of Kennebec, the first publication being fourteen days before the day of said meeting.

A true record.

Attest:

EDWARD ROWE, *Clerk.*

72 Pursuant to the foregoing notice, the bondholders met at the time and place appointed, and the meeting — called to order by the president.

The record of the call for the meeting was read by the clerk.

The expense and earnings of the road were read by the treasurer, also the report of the superintendent, accepted and ordered to be put on file.

Voted, that A. R. Small, R. W. Dunn, Wm. H. Brown, be the committee to receive, sort and count the votes for directors. Number of directors to be seven.

The committee having attended to that duty, reported:

That R. B. Dunn, John Ayer, Edward Rowe, R. W. Dunn, Wm. H. Brown, Nathan Weston and F. W. Hill were unanimously elected directors for the ensuing year.

No other business before the meeting.

Adjourned.

Attest:

EDWARD ROWE, *Clerk.*

Special Meeting, May 11, 1887.

(The following is one of the copies of the printed newspaper notice pasted on page twenty-three.)

Somerset Railway Company.

At a meeting of the directors held at Oakland, April 13, 1887, voted, that a special meeting of the corporation be called, and that the following notice thereof be published as provided in the by-laws:

Notice is hereby given that a meeting of the Somerset railway corporation will be held at the company's office in Oakland, in the county of Kennebec, and State of Maine, on Wednesday, the eleventh day of May, 1887, at ten o'clock in the forenoon, to act upon the following articles, to wit:

First. To take the necessary action to conform the organization of the company to the foreclosure of the mortgage securing the bonds upon such corporation was formed.

73 Second. To see if the company will reduce the par value of the shares of the capital stock to correspond to the actual value of the property of the corporation.

Third. To see if the corporation will repeal the present code of by-laws of said company and adopt a new code as revised by the directors.

Fourth. To see if the corporation will authorize the directors to complete its railroad from Anson to Bingham.

Fifth. To see if the corporation will authorize the issue of the bonds secured by a mortgage of the corporate property to complete the company's railroad from Anson to Bingham.

Sixth. To act upon any other business that may legally come before said meeting.

Per order of directors.

EDWARD ROWE, *Clerk*.

NORRIDGEWOCK, *April 16, 1887.*

The foregoing notice was published three weeks successively in the Union Advocate, a newspaper published in Anson, in the county of Somerset, and the Waterville Sentinel, a newspaper published in Waterville, in the county of Kennebec, the first publication being fourteen days before the day of said meeting.

A true record.

Attest:

EDWARD ROWE, *Clerk*.

MAY 11, 1887.

Pursuant to the foregoing notice, the Somerset Railway Company met at the time and place appointed and the meeting called to order by the president, the call for the meeting read by the clerk.

Article first. Voted to be laid upon the table.

Article second. Voted to be passed over.

Article third. Voted that the by-laws as revised by the directors, be accepted and adopted, as the by-laws of this company.

(See page 140.)

74 Article fourth. Voted, the directors be authorized to complete the road from Anson to Bingham.

On motion of Mr. Harrington that article first be acted upon—

1. To take the necessary action to conform the organization of the company to the foreclosure of the mortgage securing the bonds upon which such corporation was formed.

Voted, that article first be accepted. Yeas, seven. Nays, two.

1. Whereas the mortgage given to secure bonds upon which this corporation was formed, dated the first day of July, A. D. 1871, was by a decree of the supreme judicial court of the State upon due proceedings thereon, finally foreclosed on the first day of April, A. D. 1887. And whereas under the statute in such case made and provided such foreclosure inured for the benefit of this corporation.

And whereas said corporation, on the eighth day of July, A. D. 1884, became the owner of all the right in equity which the said Somerset Railroad Company or any parties claiming under it, had of redeeming said mortgaged property from said mortgage, by deed of that date from Charles R. McFadden, deputy sheriff in and for the county of Kennebec, by virtue of a sale on execution of said right of redemption and the time for redeeming from said sale expired without any redemption therefrom.

And whereas by section one hundred and eleven of chapter fifty-one of the Revised Statutes, the capital stock of this corporation is equal to the amount of the unpaid bonds and overdue coupons, secured by said mortgage, taken at their face at the time of the organization of this corporation, to wit, the fifteenth day of August, A. D. 1883, and must be divided into shares, of one hundred dollars each.

That the proper officers of the company issue certificates of stock in the form provided in the by-laws to be adopted, to the holders of such bonds and coupons overdue on said fifteenth day of August, A. D. 1883, on presentation and surrender of such bonds and coupons as follows: A certificate for one share of stock for each one hundred dollars of the principal of said bonds, and a certificate of one share of stock for each one hundred dollars of coupons outstanding and overdue on said fifteenth day of August, A. D. 1883; and the treasurer may give a receipt for such coupons when presented in sums of less than one hundred dollars entitling the holder to receive a certificate for one share of stock when such receipts to the amount of one hundred dollars are received and surrendered.

Voted to adjourn this meeting two weeks, to May 25th, to meet at this place at 10 a. m.

Adjourned.

EDWARD ROWE, *Clerk.*

May 25th.—Met as per adjournment; after some discussion on subjects before the meeting, adjourned to meet at this place two weeks from this day, Wednesday, June 8, at 10 a. m.

EDWARD ROWE, *Clerk.*

OAKLAND, MAINE, June 8, 1887—10 o'clock a. m.

Met pursuant to adjournment.

Meeting called to order by John Ayer, president. John Ayer, F. W. Hill and C. A. Harrington, were appointed a committee to confer with the directors of the Maine Central railroad relative to a lease or sale of the road.

Voted to adjourn to 10 a. m., one week from today.

EDWARD ROWE, *Clerk.*

OAKLAND, MAINE, June 15, 1887—10 o'clock a. m.

Met as per adjournment and meeting called to order by John Ayer, president.

Chose A. R. Small, clerk *pro tem.*, who was sworn by G. T. Stevens, justice of the peace. Committee to confer with M. C. R. R. reported.

On motion, voted to adjourn to meet at same hour and place, one week from today.

A. R. SMALL,
Clerk pro Tem.

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OAKLAND, MAINE, June 22, 1887.

Met pursuant to adjournment.

Meeting called to order by John Ayer, president.

Chose A. R. Small, clerk *pro tem.*, who was sworn by G. T. Stevens, justice of the peace.

On motion, adjourned to meet at 2 o'clock p. m.

2 O'CLOCK P. M., June 22, 1887.

Met as per adjournment. Meeting called to order by John Ayer, president.

On motion of Mr. Dunn duly seconded, it was voted by a stock vote (it being called for) that the directors be authorized to issue the bonds of the Somerset railway secured by a mortgage of the corporate property to complete the company's railroad from Anson to Bingham. Yeas, twenty-six hundred. Nays, five hundred ninety-six.

On motion of Mr. Dunn duly seconded, it was voted that the mortgage shall not exceed in amount the sum of two hundred seventy-five thousand dollars (\$275,000).

Voted to adjourn.

A. R. SMALL,
Clerk pro Tem.

Somerset railway.

Special Meeting of the Stockholders.

(The following is one of the copies of the printed newspaper notices pasted on p. 29.)

OFFICE OF THE SOMERSET RAILWAY,
OAKLAND, MAINE, July 19th, 1887.

A meeting of the stockholders of the Somerset railway is hereby called at the office of said railway in Oakland, on Saturday, the 6th day of August, 1887, at 10 o'clock, a. m., to act on the following:

To see if the stockholders will approve and confirm a mortgage of the company's property to secure bonds to the amount of two hundred and twenty-five thousand dollars (\$225,000.00) to be
77 issued for the purpose of extending the company's railroad to Bingham, in the form in which such mortgage shall be presented at the meeting.

By order of the directors.

EDWARD ROWE,
Prop. Clerk.

The foregoing notice was published two weeks successively in the Union Advocate, a newspaper published in Anson, in the county of Somerset, and in the Waterville Sentinel, a newspaper published in Waterville, county of Kennebec, the first publication being at least fourteen days before said meeting.

A true record.

Attest:

EDWARD ROWE,
Prop. Clerk.

Stockholders' Meeting.

OFFICE OF THE SOMERSET RAILWAY,
OAKLAND, MAINE, August 6th, 1887.

Pursuant to the foregoing notice, the stockholders of the Somerset railway, met at the place and hour designated.

They were called to order by John Ayer, president, who then read the call for the meeting. It was moved by Mr. Dunn and duly seconded, "that the following draft of a mortgage of the company's railway be ratified and confirmed, and that the directors be authorized to fill the blanks therein, and cause the same to be executed and delivered, and the bonds issued as therein provided for, to the amount of two hundred and twenty-five thousand dollars (\$225,000.00), and that the whole matter of the sale and disposition of the bonds be left with the directors with full powers."

Mortgage.

"Whereas the Somerset railway, a corporation established by law, in accordance with a vote of its stockholders at a meeting thereof, held at Oakland on the twenty-second day of June, A. D. 1887, and at a meeting of the directors of said company held at Oakland on the first day of October, A. D. 1887, authorized the issue of its bonds to an amount not exceeding in the whole two hundred

and twenty-five thousand dollars, payable at Boston in the
78 Commonwealth of Massachusetts, and at the treasurer's office of said company in thirty years from the first day of July, A. D. 1887, with interest at the rate of five per cent. per annum, payable semi-annually in Boston, and at the treasurer's office of said company aforesaid, according to the coupons annexed to each bond, each of which bonds is to be signed by the president and treasurer of said company in its behalf and countersigned by two at least of the trustees hereinafter named.

Now for the purpose of securing the bonds aforesaid and the coupons thereunto annexed: Know all men by these presents, that the said Somerset railway in consideration of the engagement herein made, and of one dollar to them paid by Joseph R. Bodwell of Hallowell, in the county of Kennebec, Edmund F. Webb and Everett R. Drummond, both of Waterville, in said county, doth hereby give, grant, bargain, sell and convey to the said Joseph R. Bodwell, Edmund F. Webb and Everett R. Drummond, and their successors in joint tenancy, the railroad of said Somerset railway from its junction with the Maine Central railroad in Oakland, in the county of Kennebec, to its terminus in Bingham, in the county of Somerset, and situate in the counties of Kennebec and Somerset, with the franchise of said company and all its real estate, and all its personal property of every nature used in connection with its said railroad, now possessed or to be hereafter acquired.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof; to said grantees and their successors in joint tenancy forever, but in trust, neverthe-

less, as hereinafter provided; and the said Somerset railway doth hereby covenant with the said grantees and their successors that it has good right to sell and convey all the property aforesaid; that the same is free from all encumbrances, and that it will warrant and defend the same to said grantees and their successors, against the lawful claims and demands of all persons. Provided, however, if the said company shall pay said bonds and coupons as they severally become due, and do and perform all on their part to be

79 done and performed as hereinafter stipulated, this deed shall be null and void, otherwise remain in full force.

This conveyance is made to said grantees for the benefit of the holders of the bonds of said company, to be issued as herein provided upon the trusts and stipulations following:

First. Said grantees hereby accept said trust and hereby covenant with said company, to perform it faithfully according to the stipulations of this deed and the provisions of law.

Second. It is agreed that said company shall keep said property in good repair.

Third. Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges *prima facie* of said breach of condition, and said company shall submit without resistance to any act of theirs, for such purposes not being bound by their judgment in a final trial and decision respecting a breach of condition.

Fourth. Said company shall be entitled to the possession and management of said property until breach of condition of this mortgage and also in case of breach of condition where subsequent performance by it is accepted.

Fifth. Said trustees shall in no event be personally liable for the doings of each other, but each is to be accountable for his own misdoings only; a majority of them may do any act herein provided for, when it appears that the other had notice and declined to act, or omitted to attend a meeting duly notified, when that matter was to be under consideration.

Sixth. It is further agreed that said company may in its discretion, sell, exchange or otherwise dispose of any or all locomotives, tenders, cars, rolling stock, tools and materials, and all other personal property which may become impaired by use, or require renewal, and convey the same free and clear of all lien of this mortgage; but all property of whatever kind, whether real or

80 personal, obtained in place of property sold or disposed of as aforesaid, or otherwise acquired hereafter by said company, shall be and become subject to, and bound by the lien of this mortgage, as if it were now owned by it and especially described herein, and if personal property, shall be deemed, when acquired, to be attached to said real estate.

Seventh. It is further agreed that said railroad company shall at

the request of its trustees, execute and deliver such further deeds of conveyance of all the property now possessed or to be hereafter acquired by said company, herein conveyed or intended to be conveyed, and upon the trust herein set forth, as may be necessary for the better security of said bonds.

Eighth. It is hereby agreed that either of said trustees may resign; such resignation to take effect sixty days after notice thereof in writing to said company, and to his cotrustees.

In witness whereof, the Somerset railway has caused this deed to be subscribed in its behalf by John Ayer, president of said company, and countersigned by Abner R. Small, its treasurer, and its seal affixed, and we, the said Joseph R. Bodwell, Edmund F. Webb and Everett R. Drummond, in token of our acceptance of said trust have hereunto set our hands and seals this (fifteenth) day of October, A. D. 1887."

KENNEBEC, ss :

OCTOBER 15, 1887.

Personally appeared John Ayer, president of the Somerset railway, and acknowledged this instrument by him signed in his said capacity, to be the free act and deed of said corporation.

Before me—

(Signed)

GEORGE W. FIELD,

Justice of the Peace.

(Recorded in Kenn. Reg. of Deeds, Book 366, page 423. Rec'd Oct. 17, 1887, 4 h. 10 m.)

(Recorded in Som. Reg. of Deeds, vol. 193, pages 137, 139. Rec'd Oct. 21st, 1887, at 8 a. m.)

81 Upon the foregoing motion a stock vote was taken and resulted as follows :

Yeas	2,654 shares.
B. P. J. Weston, voting "yes"	25 shares.
T. B. Weston, "	11 shares.
John Ayer, "	20 shares.
F. W. Hill, "	100 shares.
R. B. Dunn, "	500 shares.
R. B. Dunn, prox. "	2,000 shares.

2,654

Nays	605 shares.
A. H. Ware, voting "no"	1 share.
W. H. Brown, "	41 shares.
Inhab. of Anson, "	275 shares.
S. S. Thompson, "	288 shares.

605 shares.

On motion, duly seconded, voted to adjourn.

Attest :

EDWARD ROWE,

Prop. Clerk.

1887, OCTOBER 21.

Call for Annual Meeting of Stockholders.

(The following is one of the copies of the printed newspaper notice pasted on page 37 :)

Somerset railway.

Annual Meeting.

Notice is hereby given that the first annual meeting of the stockholders of the Somerset railway, will be held at the office of said railway, in Oakland, on Wednesday, the ninth day of November, A. D. 1887, at ten o'clock in the forenoon to act upon the following articles, viz :

First. To hear the reports of the directors and treasurer, and act thereon.

Second. To fix the number of, and elect the directors for the ensuing year.

82 Third. To act upon any other business that may come before the meeting.

By order of the directors.

JOHN AYER, *President.*

OAKLAND, MAINE, *October 21, 1887.*

The foregoing notice was published two weeks successively in the "Union Advocate," published at North Anson, Somerset county, and in the "Waterville Mail," published in Waterville, county of Kennebec; the first publication being fourteen days prior to said meeting.

JOHN AYER, *President.*

1887, NOVEMBER 9.

Annual Meeting of the Stockholders of Somerset Railway.

Pursuant to the foregoing notice, the stockholders met at the hour and place designated, and were called to order by the president, who read the call for the meeting.

The report of the directors and treasurer was read and accepted.

On motion of Mr. Dunn, it was voted that the number of directors be fixed at nine.

On motion, voted that A. R. Small, A. J. Libby and R. W. Dunn, be a committee to receive, sort and count the ballots cast for directors.

Voted, to proceed to choice of directors.

The committee having attended to their duty reported that a unanimous choice was made of R. B. Dunn, John Ayer, Nathan Weston, W. H. Brown, F. W. Hill, R. W. Dunn, Edward Rowe, A. J. Libby and Thomas Flint.

And thereupon Messrs. Dunn, Ayer, Weston, Brown, Hill, Dunn,

Rowe, Libby and Flint were declared duly elected directors for the ensuing year.

Whole number of ballots cast, seven.

A. R. SMALL, *Clerk*.

83 (The following is one of the copies of the printed notices pasted on p. 38 :)

Call for Annual Meeting of Stockholders.

OAKLAND, MAINE, Oct. 29, 1888.

The annual meeting of the stockholders of the Somerset railroad, will be held at the office of said company in Oakland, on Wednesday, November 14th, 1888, at 10 o'clock a. m.

1st. To hear the reports of the treasurer and other officers, and act thereon.

2nd. To fix the number of and elect the directors for the ensuing year.

3rd. To transact any other business that may legally come before said meeting.

A. R. SMALL, *Clerk*.

The foregoing notice was published two weeks successively in the Madison Bulletin, a newspaper published in Madison, county of Somerset, and in the Oakland Observer, a newspaper published in Oakland, county of Kennebec; the first publication being in the Bulletin of November 1, and in the Observer of November 2, 1888.

Call for Special Meeting of Stockholders.

(The following is one of the copies of the printed newspaper notice pasted on p. 41 :)

Somerset railway.

Special Meeting of Stockholders.

Whereas, the notice of the annual meeting of the stockholders of the Somerset railway to be held at the office of said company in Oakland, on Wednesday, November 14th, 1888, at 10 o'clock, a. m., as published in the Madison Bulletin of November 1st, is not a legal notice, by reason of the failure of the publishers to print the date and the name of the clerk, as affixed to original copy of said notice furnished for publication. Notice is hereby given that a

84 special meeting of the stockholders of the Somerset railway will be held at the office of said company in Oakland, Wednesday, Dec. 12, next, at 10 o'clock a. m.

First. To hear the report of the treasurer and of other officers, and act thereon.

Second. To fix the number of and elect directors for the ensuing year.

Third. To see if the stockholders will confirm the action of the directors in building a branch railway from the main line to Dod-lin granite quarry.

Fourth. To act upon any other business that may legally come before the meeting.

By order of the directors.

A. R. SMALL, *Clerk.*

OAKLAND, MAINE, Nov. 12, 1888.

The foregoing notice was published two weeks successively in the Waterville Sentinel, a newspaper published in Waterville, county of Kennebec, and in the Anson Advocate, a newspaper published in Anson, Somerset county; the first publication being at least fourteen days prior to said meeting.

A. R. SMALL, *Clerk.*

Somerset railway.

Stockholders' Meeting.

OAKLAND, MAINE, Dec. 12, 1888.

Pursuant to the foregoing notice, the stockholders of the Somerset railway, met at the place and hour designated.

The meeting was called to order by John Ayer, president.

On motion, duly seconded, it was voted, to dispense with the reading of the reports of the treasurer and other officers, printed copies of the same having been placed in the hands of all stockholders present, and that said reports be accepted.

On motion of Mr. R. B. Dunn, duly seconded, it was voted, that the meeting proceed to the election of directors, and that the number be fixed at eleven. A. R. Small, R. W. Dunn, and B. P. J.

85 Weston were appointed a committee to receive, sort and count the ballots, which committee attended to its duties and reported that the meeting had made a unanimous choice of the following for a board of directors for the ensuing year: R. B. Dunn, F. W. Hill, W. H. Brown, A. J. Libby, B. P. J. Weston, R. W. Dunn, John Ayer, E. F. Webb, Omar Clark, Stanton Day, W. M. Ayer. The report of the committee was accepted, whereupon Messrs. Dunn, Hill, Brown, Libby, Weston, Dunn, Ayer, Webb, Clark, Day, and Ayer were declared duly elected.

On motion of R. W. Dunn, seconded by Mr. Hill, voted that the action of the directors in building a branch railway from the main line to Dodlin granite quarry be confirmed.

Voted, to adjourn.

A. R. SMALL, *Clerk.*

Call for Annual Meeting.

Stockholders' meeting.

(The following is one of the copies of the printed newspaper notice pasted on p. 43:)

The annual meeting of the stockholders of the Somerset railway will be held at the office of said company, in Oakland, Maine, at 10

o'clock, a. m., Wednesday, November 13th, 1889, to act on the following:

- 1st. To hear the report of the treasurer, and other officers.
- 2nd. To fix the number of, and elect a board of directors for the ensuing year.
- 3d. To change the date for holding the annual meeting.

A. R. SMALL, *Clerk.*

OAKLAND, MAINE, Oct. 14, 1889.

The foregoing notice was published two weeks successively in the "Waterville Mail," a newspaper published in Waterville, county of Kennebec, and in the "Union Advocate," a newspaper published in Anson, county of Somerset; the first publication being at least fourteen days prior to said meeting.

A. R. SMALL, *Clerk.*

86

Somerset railway.

Stockholders' Meeting.

OAKLAND, MAINE, November 13, 1889.

Pursuant to foregoing call, the stockholders of the Somerset railway met at the place and hour designated. Meeting was called to order by John Ayer, president, who read the call. The treasurer reported that for want of time he was unable to make full report.

On motion of Mr. Hill,

Voted, that the treasurer, soon as his annual report is completed, have the same printed, and copies sent to each and every stockholder.

On motion of Mr. Hill, duly seconded,

Voted, to fix the number of directors at eleven (11).

Voted, to proceed to the choice of directors, and Messrs. A. R. Small, B. P. J. Weston and R. W. Dunn were appointed a committee to receive, sort and count the votes.

The committee having attended to that duty, reported as follows: "A unanimous choice has been made of the following for directors for the ensuing year, to wit: F. W. Hill, A. J. Libby, B. P. J. Weston, R. W. Dunn, John Ayer, E. F. Webb, Omar Clark, Stanton Day, W. M. Ayer, Thomas Flint, W. M. Dunn, and the said gentlemen were declared duly elected directors for the ensuing year."

On motion of R. W. Dunn, seconded by Mr. Hill,

Voted, to amend Art. III, by striking out the words, "and on the second Wednesday of November," and insert in their stead "and on the second Wednesday of December," meaning that the annual meeting of the stockholders shall be holden hereafter on the second Wednesday in December commencing Wednesday, December 10, 1890.

The report of committee appointed at directors' meeting held September 26, to draft resolutions on the death of Mr. Dunn, was read, accepted and ordered spread upon the records (see page 45).

87 Voted, that the clerk spread upon the records appropriate notice of the death of W. H. Brown, late director.
Adjourned.

A. R. SMALL, *Clerk*.

STATE OF MAINE, }
Kennebec, } ss :

NOVEMBER 13, 1889.

Personally appeared Abner R. Small, and made oath that he would faithfully perform the duties of clerk of the Somerset railway, during the term of his office.

Before me—

R. WESLEY DUNN,
Justice of the Peace.

Resolutions on the Death of Hon. R. B. Dunn.

Whereas, after a long and eminently useful career the Hon. R. B. Dunn, at a ripe old age, laid aside the cares and burdens of life to reap the full fruition of his ceaseless activity in behalf of others:

Resolved, That the remembrance of his long association with us as director in the Somerset railway brings home to us his wise counsels, his unflagging interest, his untiring energy, and the bright hopefulness of his nature in the ultimate completion of the Somerset railway enterprise.

Resolved, That we remember his faithfulness and devotion to the interests of the road, and carry to completion the enterprise which lay so near his heart.

Resolved, That we convey to the relatives of our late honored member our sincere condolence.

(Signed)

E. F. WEBB,
A. R. SMALL,
Committee.

Somerset railway.

Call for Annual Meeting.

(The following is one of the copies of the printed newspaper notice pasted on p. 46.)

88

Somerset railway.

Stockholders' Meeting.

The annual meeting of the stockholders of the Somerset railway will be held at the office of said company in Oakland, Maine, at 10 o'clock, a. m., Wednesday, December 10th, 1890, to act upon the following:

1st. To hear the report of the treasurer and other officers.

2nd. To fix the number of and choose a board of directors for the ensuing year.

3d. To act upon any other business that may legally come before said meeting.

By order of the directors.

A. R. SMALL, *Clerk.*

OAKLAND, MAINE, Nov. 24, 1890.

The foregoing notice was published two weeks successively in the Daily Kennebec Journal, the Waterville Sentinel, and the Skowhegan Reporter; newspapers published in the State of Maine, the first publication being at least fourteen days prior to said meeting.

A. R. SMALL, *Clerk.*

Somerset railway.

Stockholders' Meeting.

OAKLAND, MAINE, Dec. 10, 1890.

Pursuant to the foregoing notice, the stockholders of Somerset railway met at place and hour designated. The meeting was called to order by John Ayer, president.

On motion of Mr. Webb, it was voted, to waive the reading of the annual report of the treasurer and of other officers; the same being printed and in the hands of all the stockholders present.

On motion of Mr. Webb, it was voted, that the number of directors for the ensuing year be eleven (11); that the meeting proceed to choice of directors.

89 On motion of Mr. Webb, it was voted that A. R. Small cast the vote for directors.

Whereupon the following were declared unanimously elected directors for the ensuing year:

F. W. Hill, Exeter, Maine.

A. J. Libby, Embden, Maine.

B. P. J. Weston, Madison, Maine.

John Ayer, Oakland, Maine.

R. W. Dunn, Waterville, Maine.

W. M. Dunn, Waterville, Maine.

E. P. Webb, Waterville, Maine.

Omar Clark, Carratunk, Maine.

Stanton Day, Boston, Mass.

W. M. Ayer, Oakland, Maine.

Thos. Flint, San Juan, Cal.

Stock represented 2,460 shares.

Voted to adjourn.

A. R. SMALL, *Clerk.*

Stockholders' Meeting, 1880.

Mr. Wm. Atkinson introduced the following resolution, and moved it be adopted.

Resolved, That the time has come for the Somerset railroad and its friends to make a strenuous effort to extend their line to Solon or Carratunk Falls, with a view of securing a large prospective

business, and our directors and other friends of our road are especially urged to do everything they can to accomplish this result. Voted, it be adopted.

A true record.

Attest:

EDWARD ROWE, *Clerk.*

Annual Stockholders' Meeting.

JUNE 13, 1883.

Pursuant to the foregoing notice the stockholders met at the time and place appointed. And the meeting was called to order by the president.

Mr. Lindsey asked leave to make a few remarks and suggestions in regard to the condition of the affairs of the road.

Leave granted. At the close of his remarks, and his suggestions made, a discussion was entered into by Mr. Lindsey, Mr. Atkinson, Mr. Hill, Mr. Stevens, Mr. Dunn, and others. Mr. Lindsey suggested we defer voting for directors, and proceed with the discussion, to get the views of the bondholders and stockholders. Accepted and agreed to. Mr. A. Moore wants the creditors as well as bondholders provided for.

Mr. S. S. Thompson wants a committee to confer with the bondholders and stockholders to arrange matters without litigation if possible. Mr. Atkinson moves a committee be elected to settle old claims of directors.

Voted, that a committee of five, consisting of S. D. Lindsey, S. S. Thompson, F. W. Hill, A. Moore and J. H. Drummond, be appointed to examine the claims of directors of this road for past services and expenditures, and report if practicable a mode of settlement of such claims. Also to report the respective rights of the bondholders and stockholders, to the possession of the road, and make such recommendation as they deem advisable, touching a foreclosure of the mortgage, and yielding possession of the road to the bondholders, and report the same to this meeting, which stands adjourned to four weeks from today, to meet at Memorial hall, Oakland, at 10 o'clock a. m. Directors to file their claims with Mr. Lindsey, as early as possible. Adjourned to July 11, 1883.

Stockholders' Meeting, as by Adjournment.

The stockholders met at Memorial hall, Oakland, Wednesday, July 11th, at 10 o'clock a. m.

Mr. Lindsey, chairman of the committee, read their report.

Mr. Dunn moved it be accepted.

Mr. Atkinson moved the report be recommitted to the committee for a more thorough investigation.

Mr. Lindsey, of the committee, explained the doings and authority of the committee, which was so satisfactory, Mr. Atkinson withdrew his motion, and the report was accepted.

Committee to receive, sort and count the votes for directors.

Mr. Lindsey, of Norridgewock.

Mr. Small, of Oakland.

Mr. Weston, of Madison.

The committee having attended to the duty assigned them, reported :

Whole number of votes received, 3,732.

Necessary for a choice, 1,867.

Mr. John Ayer had three thousand seven hundred and thirty-two, 3,732.

Mr. R. B. Dunn had three thousand seven hundred and thirty-two, 3,732.

Mr. Edward Rowe had three thousand seven hundred and thirty-two, 3,732.

Mr. George E. B. Jackson had three thousand seven hundred and thirty-two, 3,732.

Mr. S. D. Lindsey had three thousand seven hundred and thirty-two, 3,732.

Mr. S. S. Thompson had three thousand seven hundred and thirty-two, 3,732.

Mr. Wm. H. Brown had three thousand seven hundred and thirty-two, 3,732.

Mr. Albert Moore had three thousand four hundred and six, 3,406.

Mr. F. W. Hill had three thousand seven hundred and thirty-two, 3,732.

Mr. Nathan Weston had three thousand seven hundred and thirty-two, 3,732.

Mr. Calvin Walker had three thousand seven hundred and thirty-two, 3,732.

A true record.

Attest :

EDWARD ROWE, *Clerk*.

92

Report of Committee.

To the stockholders of the Somerset Railroad Company :

The committee appointed by your vote at the meeting held June 13th, ult., have considered the questions referred to them and respectfully submit their views as follows :

They find by the treasurer's report there is due from the company, exclusive of interest, a floating debt over all

assets of.....	\$51,435 67
Interest on same, estimated.....	36,000 00
Interest due on bonded debt.....	262,222 00

Making a total of..... \$349,657 67

All of which is now due and payable.

Several of the directors of the road have incurred large liabilities and made advances in money for the construction of the road for which they have been but partially reimbursed, and for their per-

sonal services they have generally received no compensation, although by vote passed May 15, 1868, each director was entitled to receive \$2.50 per day for services and ten cents per mile each way for actual travel.

A tabulated statement by the clerk will exhibit the attendance of each director and the same is attached hereto.

There has been ten years' default in payment of interest on the bonds, and the holders hitherto have made no attempt to enforce collection or take possession of the road, for the reason, as it is believed, that recognizing the services and sacrifices made by the directors, they submitted to forego their legal right to the possession of the road, in the hope that the services and liabilities of the directors and other indebtedness might be paid from the income of the road. This hope has not been realized, and there seems a general disposition on part of holders of the bonds to prefer their claims. The legal rights of the stockholders and bondholders are clear. All income of the company while the road remains in its possession is under the control of the directors, and when the road passes to the possession of the bondholders then its income must go to the payment of their claims.

93 Process has already been begun to foreclose the mortgage, and several suits that threaten protracted litigation are pending.

In the judgment of your committee the most judicious course for all parties to pursue is,

1st. With the available assets at the disposal of the directors to make as equitable and just a settlement as possible of the floating debt.

2nd. That the holders of the bonds organize a new corporation under the statute and take possession of the road, at such date as their organization entitles them to, and recommend that the stockholders surrender the possession of the road.

Messrs. Wm. Atkinson, Edward Rowe, Nicholas Smith, Samuel Bunker and Wm. H. Brown, only of the directors have presented claims, which the committee have not undertaken to audit, but submit herewith for the information of the meeting.

S. D. LINDSEY,
F. W. HILL,
S. S. THOMPSON,
ALBERT MOORE,
JOSIAH H. DRUMMOND,

Committee.

Report read by Mr. Lindsey.

On motion of Mr. Dunn that it be accepted:

Voted to accept it.

A true record.

Attest:

EDWARD ROWE, *Clerk.*

The following are abstracts from the directors' records of the Somerset railway:

(P. 1.) *Directors' Meeting, Memorial Hall.*

OAKLAND, MAINE, Aug. 15, 1883.

The directors-elect of the Somerset railway met at Memorial hall immediately after the adjournment of the stockholders' meeting, upon call of Hon. R. B. Dunn.

Present: John Ayer, Reuben B. Dunn, Stephen D. Lindsey, Francis W. Hill, R. Wesley Dunn, Edward Rowe, Nathan Weston, William H. Brown.

Josiah H. Drummond, in behalf of Sumner S. Thompson, waived notice to said Thompson of this meeting, being authorized to act for him.

The directors were called to order, and voted to proceed to elect officers of the corporation for the year.

And the following were unanimously elected, to wit:

President, John Ayer.

Clerk, Edward Rowe.

Treasurer, Abner R. Small.

Edward Rowe was sworn as clerk by Stephen D. Lindsey, Esq., justice of the peace.

William M. Ayer was unanimously appointed superintendent.

On motion, voted that the officers be authorized and directed to take possession of the railroad known as the Somerset railroad, and operate the same for and in the name of this company on and after the first day of September next.

On motion, voted that Hon. S. D. Lindsey be a committee to purchase the old corporation's right of redeeming said railroad from the mortgage upon which this company is organized, or if said right of redemption shall be sold on execution, to bid in the same, for and in the name of this company, and take a conveyance thereof to this company, provided it can be done for such price as he shall deem reasonable; and that the treasurer be authorized and directed to pay out of any funds in his hands the price which said committee shall agree to pay for said right of redemption.

Voted to adjourn.

Attest:

EDWARD ROWE, *Clerk.*

At a meeting of the directors held at Oakland, Nov. 3, 1883, (p. 3) it was voted, "that the president of the Somerset railway be, and he is hereby authorized and directed, in behalf of said corporation, to subscribe the sum of ten thousand dollars (\$10,000,) to the capital stock of a proposed railway, from the terminus of the Somerset railway in Anson to New Portland."

95 At a directors' meeting held June 3, 1886, (p. 5,) at which the defendant, William H. Brown, was present, it was voted unanimously "To pay Nathan Weston for one box car, \$400.00; to settle with John Ayer, balance due him on Somerset engine and snow plough, note on interest \$6,000; to settle with Dunn Edge Tool Company for amount due them on three passenger cars, \$4,000; one baggage car, \$2,000; two locomotives \$4,000; two box cars, \$800; by note on interest after six months."

At a meeting of the directors held April 13, 1887, (p. 7,) it was voted "That the present code of by-laws be amended." Voted "That the president and clerk, revise and amend the same, prior to the meeting of the stockholders, to be acted upon by them."

At a directors' meeting held July 19, 1887, (p. 8).

"On motion of Mr. Dunn duly recorded, it was voted, that a special meeting of the stockholders be held at the office of the Somerset railway in Oakland, on Saturday, Aug. 6th, at 10 o'clock a. m., to act upon the following:

To see if the stockholders will approve and confirm the mortgage of the company's property to secure bonds to the amount of two hundred and twenty-five thousand dollars, to be issued for the purpose of extending the company's railroad to Bingham, in the form in which such mortgage shall be presented at the meeting."

At a directors' meeting held on the 6th, 1887, (p. 9,) it was voted, "To build a branch railway from the company's main track in Norridgewock, to Dodlin granite quarry, over land of Col. I. S. Bangs, provided the right of way was made free to the Somerset Railway Company."

At a meeting of the directors held Nov. 9, 1887, (p. 12,) it was voted, "That the action of the officers of the railway, in making survey of the line from North Anson to Bingham, and in erecting repair shops at Oakland, be approved and confirmed."

At a meeting of the directors held Nov. 26, 1888, (p. 14,) it was voted, "That the action of the president in selling \$100,000 of the bonds of the company at ninety per cent. of the face of the
96 bonds and the payment of the expense incurred in effecting the sale, be ratified and confirmed."

"That the president be, and is now authorized to effect the sale of the balance of the company's bonds at ninety per cent. of their face value, and pay all necessary commissions and brokerage."

"That the treasurer be authorized to borrow a sum of money not exceeding in amount \$50,000.00 on the notes of the corporation, secured by pledge of the mortgage bonds of the company, at a rate of not less than seven per cent. of the principal of the bonds, for the amount borrowed, on a time not exceeding two years, at a rate of interest not exceeding six per cent. payable annually or oftener; the same to be borrowed from time to time as the treasurer may decide, leaving it optional with the lenders to purchase the bonds so pledged at ninety per cent. of their face value and accrued interest, when the road shall be completed to Bingham, the treasurer reserving the right, however, to pay the notes with accrued interest, and redeem the bonds so pledged, if a sale of bonds shall be effected before the road is completed to Bingham."

"That the action of the president and treasurer in borrowing such sums of money for the purposes stated, and in pledging the bonds of the company at a rate of not less than ninety per cent. of the principal of the bonds as security, be confirmed, ratified and made valid."

At a meeting of the directors held April 16, 1889, (p. 17,) it was

voted, "Whereas this company issued its bonds, viz: Thirty (30) bonds of the denomination of five hundred dollars (\$500), numbered 211 to 240 inclusive, and fifty (50) bonds of the denomination of two hundred dollars (\$200) each and numbered 211 to 360 inclusive, and fifty (50) bonds of the denomination of one hundred dollars (\$100) and numbered 361 to 410 inclusive; and whereas the trustees of the bondholders have countersigned the above bonds; and whereas none of the above bonds have been negotiated, but remain in the treasury of the company; and whereas bonds of the denominations of one thousand dollars (\$1,000) can be negotiated to better advantage; therefore voted "To destroy the bonds above described, and to issue in lieu thereof thirty (30) bonds of the denomination of one thousand dollars (\$1,000) each; and that the consent of the trustees thereto be obtained in writing and recorded in the records of the company."

(P. 18.) To the Somerset railway, Oakland, Maine:

The undersigned, Edmund F. Webb and Everett R. Drummond, trustees under a mortgage made by said railway company to secure the payment of \$225,000.00 of its bonds, and Abner R. Small, treasurer of said corporation, hereby certify that on this 29th day of April, A. D. 1889, we have burned and destroyed bonds which have been issued by said railway company and countersigned by trustees, but which had never been negotiated, as follows:

Thirty bonds of the denomination of \$500 each, and numbered 211 to 240 inclusive; and fifty bonds of the denomination of \$200 each, and numbered 311 to 360 inclusive; and fifty bonds of the denomination of \$100 each, and numbered 361 to 410 inclusive.

We further certify that we have countersigned, as such trustees, thirty bonds of the denomination of \$1,000 each, which are in lieu of the above-described bonds destroyed and are numbered 211 to 240 inclusive.

This action on our part is taken under the direction and by authority of a vote of the directors of the Somerset railway passed April 16, 1889.

Waterville, Maine, April 29, A. D. 1889.

(Signed)

EDMUND F. WEBB,
EVERETT R. DRUMMOND, *Trustees*.
ABNER R. SMALL, *Treasurer*.

Abstract from the directors' records of the Somerset Railroad Company, pp. 1-8; 1-9.

(*Directors' Meeting, Aug. 15, 1883.*)

"On motion of Mr. Lindsey that a committee of three be chosen to examine the financial condition of the company,

98 "Voted, Mr. Lindsey, Moore and Hill be that committee.

"Voted, on motion of Mr. Lindsey, that the stockholders surrender possession of the road, to the bondholders, Sept. 1st, 1883.

"Voted, that Mr. Lindsey be a committee to purchase the right of redeeming the mortgage, or if sold at auction to bid it in, provided it can be done for such price as he shall deem reasonable."

Abstract of Directors' Meeting Held June 11, 1884.

"Voted, that J. H. Drummond of Portland be a committee to purchase the right of redeeming the mortgage, or if sold at auction to bid it in, provided it can be done for such price as he shall deem reasonable."

The recitals in the directors' records of the Somerset railway are that William H. Brown, one of the defendants, was duly elected a member of the first board of directors of this company Aug. 15, A. D. 1883, and was present at a meeting of the board on that day; (see p. 1;) that he was present at the next meeting of the board held Nov. 3, 1883, (p. 3); and at the next meeting of the board held Dec. 10, 1884, (p. 4); and at the next meeting of the board held Nov. 11, 1885, (p. 5); and at the next meeting of the board held June 3, 1886, (p. 5); and at the next meeting of the board held Nov. 10, 1886, (p. 6); and at the next meeting of the board held April 13, 1887, (p. 7); and at a meeting of the board held April 6, 1887, (p. 9); and at several meetings of the board held by adjournment (see p. 9); and at the meeting held Sept. 17, 1887, (p. 10); and at the meeting of the board held Nov. 9, 1887, (p. 12); and at the meeting of the board held Nov. 9, 1887 (p. 13); (one of these meetings was evidently a directors' meeting held prior to the stockholders' meeting, and the other held immediately after) and at a meeting of the board held Nov. 27, 1888 (p. 14).

It is admitted that the inhabitants of the town of Anson and T. H. Spaulding acquired their bonds in 1871, and that Alonzo Garcelon, C. I. Barker, J. M. Robbins, T. R. Herbest, William Atkinson, James Fellows, Ben. S. Collins and Henry Ingalls acquired their bonds in 1890.

It is further agreed that the plaintiff may use the copies from the records of the Somerset Railroad Company and from the records of the alleged Somerset railway, where the original records, if produced, would be admissible evidence of the matters set forth in said records; but that the defendants do not waive any objections to the sufficiency of such evidence in this case.

Plaintiff also offers in evidence the writ in suit Dunn Edge Tool Company vs. Somerset Railroad County, Kennebec county superior court, dated July 29, 1882, as follows:

(Writ.)

STATE OF MAINE, }
Kennebec, } ss :

To the sheriffs of our respective counties or either of their deputies,
Greeting:

We command you to attach the goods and estate of the Somerset Railroad Company, a corporation established by the laws of the

State of Maine and having a place of business at West Waterville in the county of Kennebec and State of Maine, to the value of one hundred and fifty thousand dollars; and to summon the said defendant (if it may be found in your precinct) to appear before our justice of the superior court, next to be holden at Augusta, within and for our county of Kennebec, on the first Tuesday of September, 1882; then and there in our said court to answer unto the Dunn Edge Tool Company, a corporation established at Waterville in the county of Kennebec and State of Maine.

In a plea of the case for that the said defendant corporation, by their treasurer duly authorized, at West Waterville, to wit, at said Augusta, on the sixteenth day of November, A. D. 1874, by its promissory note of that date by it signed for value received promised the Portland Rolling Mills Company to pay it or order the sum

of eighteen thousand five hundred and twenty-seven dollars
100 and seventy-one cents, twelve months after date, and the said

Portland Rolling Mills Company thereafterwards on the same day indorsed and delivered the said note then and still unpaid, to the said plaintiff of which the said defendant then and there had notice, by reason and in consideration whereof the said defendant became liable and promised the said plaintiff to pay it the contents of said note according to its tenor. And the said plaintiff avers that the said time has long since elapsed.

Also, for that the said defendant corporation at said West Waterville to wit, at said Augusta on the eighth day of November, A. D. 1875, by its promissory note of that date by it subscribed for value received promised the said plaintiff to pay it or its order the sum of twenty-nine thousand two hundred and fifty dollars six months after date with interest at nine per cent. annually, and the plaintiff avers that the said time has long since elapsed.

Also, for that the said defendant corporation at said West Waterville to wit, at said Augusta, on the eighth day of November, A. D. 1875, by its promissory note of that date by it subscribed for value received promised the said plaintiff to pay it or its order the sum of twenty-nine thousand two hundred and fifty dollars six months after date with interest at nine per cent. annually until paid, and the said plaintiff avers that the said time has long since elapsed.

To the damage of said plaintiff company (as it says) the sum of one hundred and fifty thousand dollars, as shall then and there be made to appear, with other due damages.

And have you there this writ, with your doings therein.

Witness, William P. Whitehouse, judge of said court at Augusta, this twenty-ninth day of July in the year of our Lord one thousand eight hundred and eighty-two.

A. C. OTIS, Clerk.

Officer's Return of Service on Defendants.

Kennebec, ss :

AUG. 4TH, A. D. 1882.

By virtue of the within writ I have summoned the president, di-

101 rectors and company of the Somerset Railroad Company within named, by delivering to A. R. Small, treasurer of said company a true and attested copy of this writ.

GEO. H. MATTHEWS,
Deputy Sheriff.

Plaintiff also offers the record in said case as follows :

STATE OF MAINE, {
Kennebec, } 88 :

At the superior court begun and holden at Augusta, within and for the county of Kennebec, on the first Tuesday of December being the fifth day of said month, anno Domini 1882.

By the Hon. William P. Whitehouse, judge of said court.

(Record.)

December Term, 1882.

THE DUNN EDGE TOOL CO.

vs.

SOMERSET RAILROAD CO.

} No. 772.

THE DUNN EDGE TOOL COMPANY, a Corporation Established at Waterville, in the County of Kennebec, Plaintiff,

versus

THE SOMERSET RAILROAD COMPANY, a Corporation Established by the Laws of the State of Maine and having a Place of Business at West Waterville, in said County, Defendants.

Date of writ, July 29, 1882. Date of service, August 4, 1882.

This action was entered at the September term, A. D. 1882.

And at this term judgment is rendered thereon for the plaintiffs for the sum of thirty-eight thousand three hundred sixty-five dollars and twenty-seven cents debt or damage and costs of suit taxed at fifteen dollars and fifteen cents.

Judgment rendered, December 30, 1882.

Ex'on issued, January 2, 1883.

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Docket Entries.

THE DUNN EDGE TOOL CO.

vs.

SOMERSET RAILROAD CO.

} No. 772.

Drummond & D.

Sep. T., 1882.—23. Dfd. c. f. j.

Dec. T., 1882.—Judgment for p't'fs. Damages, \$38,365.27. Costs, 15.15.

Ex'on issued, Jan'y 2, 1883.

Recorded vol. 5, page 427.

STATE OF MAINE, }
 Kennebec, } ss :

AUGUSTA, SATURDAY, Dec. 30, 1882.

And now on this twenty-second and last day of the term, the court order that judgment be entered in all matters finally acted upon and disposed of, except where judgment has been entered on motion as of an earlier day; that continuancies be entered in all matters unless previously continued, and that this court be adjourned without day.

Attest :

A. C. OTIS, *Clerk*.

A true copy of record and docket entries in above-entitled cause.

Attest :

W. J. CHOATE, *Clerk*.

Plaintiff also offers in evidence sheriff's deed in same case, dated July 8th, 1884, as follows :

" Know all men by these presents, that I, Charles R. McFadden of Waterville, in the county of Kennebec, and State of Maine, a deputy sheriff duly commissioned by George R. Stevens, sheriff of the county of Kennebec, aforesaid, by virtue of an execution which issued on a judgment recovered at a term of the superior court, for the county of Kennebec, holden at Augusta in the said county of Kennebec, on the first Tuesday of December, A. D. 1882, by the Dunn Edge Tool Company, a corporation established by the laws of the State of Maine, and having an office at Waterville, in said county of Kennebec, and State of Maine, against the Somerset Railroad Company, a corporation established by the laws of the State of Maine, and having an office at Oakland, formerly West Waterville, in said county of Kennebec, for the sum of thirty-eight thousand three hundred and sixty-five dollars and twenty-seven cents, debt or damage, and fifteen dollars and fifteen cents, costs of said suit, I have taken all the right in equity which the Somerset Railroad Company had on the twenty-sixth day of May, A. D. 1884, being the day the same was seized on the execution in said case, of redeeming the following mortgaged premises, to wit: The railroad extending from its junction with the Maine Central railroad in Waterville, in the county of Kennebec, to its terminus in Solon, in the county of Somerset, and situated in the counties of Kennebec and Somerset, with the franchise of said company and all its real estate connected therewith, as described in said mortgage. And on the twenty-ninth day of May, A. D. 1884, I gave notice in writing to the said Somerset Railroad Company, the within-named debtor, by leaving an attested copy of said notice at the office of said Somerset Railroad Company, that on the eighth day of July, A. D. 1884, at ten o'clock in the forenoon, at the office of the Dunn Edge Tool Company, in the town of Oakland, in said county of Kennebec, I should sell said right of equity of redemption at public auction to satisfy said execution and all fees and charges of said sale, unless redeemed by otherwise satisfying said execution, said notice having been given at least thirty days before said time appointed for the sale, and I also posted up notifications

of the time and place of said sale at the court-house in the county of Kennebec, and at the court-house in the county of Somerset, said notices having been posted at least thirty days before the eighth day of July, A. D. 1884, aforesaid, being the day of said sale above described. And I also caused a notice thereof to be inserted in the Waterville Mail, a newspaper published in the county of Kennebec, three weeks successively and in the Somerset Reporter, a newspaper published in the county of Somerset, three weeks successively, the last publication in each of said newspapers being at least four days before the said eighth day of July, A. D. 1884, aforesaid, the day of said sale, to wit: in the Waterville Mail, on

104 the twentieth day of June, A. D. 1884. When at the time and place above described, said equity not having been redeemed by otherwise satisfying the execution, I sold said right of equity of redemption at public auction, to the Somerset railway, a corporation established by the laws of the State of Maine, and having an office at Oakland, in the said county of Kennebec, and State of Maine. It being the highest bidder therefor, and more than any other person offered, for the sum of eight hundred dollars, and in consideration of the sum of eight hundred dollars aforesaid, paid to me in hand by the said Somerset railway, the receipt of which I hereby acknowledge, have given, granted, bargained and sold and by these presents do hereby give, grant, bargain, sell and convey unto the said Somerset railway its successors and assigns forever, all the right in equity the Somerset Railroad Company had on said twenty-sixth day of May, A. D. 1884, the day of the seizure thereof, to redeem the premises above described, with all the appurtenances thereto pertaining.

To have and to hold to the said Somerset railway, its successors and assigns to their use and behoof forever. Subject, however, to be redeemed agreeably to law, in such cases made and provided.

In witness whereof, I have hereunto set my hand and seal, this eighth day of July, in the year of our Lord, one thousand eight hundred and eighty-four.

CHARLES R. McFADDEN, [SEAL.]
Deputy Sheriff.

Signed, sealed and delivered in the presence of—
F. A. WALDRON.

KENNEBEC, ss :

WATERVILLE, July 17, A. D. 1884.

Then personally appeared the above-named Charles R. McFadden and acknowledged the above instrument to be his free act and deed.

F. A. WALDRON,
Justice of the Peace.

KENNEBEC, ss :

Received December 3, 1888, at 10 h. 25 m. a. m. Entered and compared:
P. M. FOGLER, Register.

105 Plaintiff also offers in evidence copy of record of suit
 Reuben B. Dunn, John Ayer and Dunn Edge Tool Company
 vs. Somerset Railroad Company, in equity, as follows:

KENNEBEC, ss :

To the honorable justices of the supreme judicial court of the State of Maine:

Reuben B. Dunn, of Waterville, in the county of Kennebec, John Ayer, of Oakland, in said county, and the Dunn Edge Tool Company, a corporation established at Oakland aforesaid, who bring this suit in behalf of themselves and such other owners of the bonds of the Somerset Railroad Company hereinafter described as choose to become parties hereto, bring this their bill in equity against the Somerset Railroad Company, a corporation established by law, and having a place of business at Oakland, aforesaid, and say:

That the Somerset Railroad Company, a corporation created by law, and having an office at Oakland, aforesaid, on the first day of July, A. D. 1871, by its mortgage deed of that date, duly executed and recorded, a copy of which is hereunto annexed and made a part hereof, mortgaged to Lewis Pierce, of Portland, in the county of Cumberland, Daniel Holland, of Lewiston, in the county of Androscoggin, and Stephen D. Lindsey, of Norridgewock, in the county of Somerset, as trustees and their successors in joint tenancy, the railroad of said Somerset Railroad Company, from its junction with the Maine Central railroad in Waterville, (now Oakland) in the county of Kennebec, to its terminus in Solon, in the county of Somerset, and situated in the counties of Kennebec and Somerset, with the franchise of said company, and all its real estate, and all its personal property of every nature used in connection with its said railroad then possessed or to be thereafter acquired.

To hold said premises in trust for the holders of the bonds of said Somerset Railroad Company to be issued by it to an amount not exceeding in the whole the sum of five hundred thousand dollars, payable at Boston, in the Commonwealth of Massachusetts, and

106 at the treasurer's office of said company in twenty years
 from the first day of July, A. D. 1871, with interest at the
 rate of seven per cent. per annum payable semi-annually in
 Boston, and at the treasurer's office of said company in gold according to the coupons annexed to each bond and to secure the payment of said bonds and the interest coupons thereunto attached as they should become due.

And your orators aver that said company made and issued its bonds secured by said mortgage to the amount of four hundred and fifty thousand dollars and no more as hereinbefore described and sold the same to divers parties and said bonds are all still outstanding and unpaid.

And your orators aver that no interest has been paid on said bonds for more than three years, to wit, since the first day of July, A. D. 1871, and that only a portion of the coupons on said bonds

falling due on the first day of January, A. D. 1877, have been paid and that since said first day of January, A. D. 1874, only an insignificant amount has been paid, to wit, on the first day of July, A. D. 1874, interest coupons to the amount of seventy-three dollars and fifty cents; on the first day of January, A. D. 1875, seven hundred and three dollars and fifty cents; on the first day of July, A. D. 1875, two hundred and seventeen dollars; on the first day of January, A. D. 1876, twenty-four dollars and fifty cents; on the first day of July, A. D. 1876, fourteen dollars; on the first day of January, A. D. 1877, seven dollars, and on the first day of July, A. D. 1877, seven dollars.

And your orators upon information and belief aver that on said respective dates after the first day of January, A. D. 1874, interest coupons on said bonds fell due, to wit, on the first day of July, A. D. 1874, six thousand six hundred and seventy-one dollars. On the first day of January, A. D. 1875, seven thousand five hundred and twenty-five dollars; on the first day of July, A. D. 1875, eleven thousand eight hundred and fifty-four dollars and fifty cents; and on the first day of January, A. D. 1876, fifteen thousand seven hundred and fifty dollars, and that none of said interest falling due at such respective dates has ever been paid except as above
107 stated, and that no interest has been paid on said bonds since the first day of July, A. D. 1877, a period of nearly six years.

And your orators aver that said trustees, to wit, Lewis Pierce, Daniel Holland and Stephen D. Lindsey, have never taken possession of said mortgaged property, nor in any manner therewith but that the same ever since has been and now is in the possession of said Somerset Railroad Company; nor have said trustees taken any measures to secure a foreclosure of said mortgage for breach of condition thereof.

And your orators aver that no corporation has been formed by the holders of said bonds as provided by law.

And your orators aver that they are the owners and holders of a majority in amount of said bonds, to wit: the said, Rueben B. Dunn, is the owner and holder of said bonds the principal of which amounts to thirty thousand dollars; the said Ayer is the owner and holder of said bonds the principal of which amounts to two thousand dollars, and said Dunn Edge Tool Company is the owner and holder of said bonds the principal of which amount- to two hundred and twelve thousand, and two hundred dollars making in all owned by your orators bonds the principal of which amounts to two hundred and forty-four thousand and two hundred dollars.

Wherefore your orators in behalf of themselves and the other holders of said bonds bring this suit for the foreclosure of said mortgage for the breach thereof caused by the failure to pay the interest coupons on said bonds as aforesaid.

In consideration whereof and forasmuch as your orators is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable. To

the end therefore that the said respondent, may if he can show cause why your orators should not have the relief hereby prayed and may according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make under its corporate seal.

And your orators pray that the court will decree a foreclosure of said mortgage, unless the arrears of interest now due on said
108 bonds shall be paid within such time as the court shall order; and that your orators may have such other and further relief, as the nature of the case may require, and to the court may seem fit.

And may it please your honors to grant unto your orators the writ of subpoena to be directed to the said Somerset Railroad Company, thereby commanding it at a certain day to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein as to your honors shall seem meet, and your orators shall ever pray.

REUBEN B. DUNN.

JOHN AYER.

DUNN EDGE TOOL COMPANY,

By REUBEN B. DUNN, *Its President.*

KENNEBEC, ss :

APRIL 18TH, 1883.

Then personally appeared the above-named Reuben B. Dunn, and made oath that he has read the foregoing bill or has heard it read and knows the contents of it, and that the same is true of his own knowledge except the matters stated therein to be on his information and belief; and that as to those matters he believes them to be true.

Before me—

R. WESLEY DUNN,

Justice — the Peace.

DRUMMOND & DRUMMOND, *Solicitors.*

Whereas the Somerset Railroad Company, a corporation established by law, in accordance with a vote of its stockholders, at a meeting thereof held at Anson, on the thirteenth day of April, A. D. 1871, and at a meeting of the directors of said company held at Anson, on the fourth day of May, A. D. 1871, proposed to issue its bonds to an amount not exceeding in the whole five hundred thousand dollars payable at Boston, in the Commonwealth of Massachusetts, and at the treasurer's office of said company, in twenty
109 years from the first day of July, A. D. 1871, with interest at the rate of seven per cent. per annum payable semi-annually in Boston, and at the treasurer's office of said company aforesaid in gold, according to the coupons annexed to each bond, each of which bonds is to be signed by the president and treasurer of said company in its behalf, and countersigned by two at least of the trustees hereinafter named. Now for the purpose of securing the

bonds aforesaid and the coupons thereunto annexed. Know all men by these presents, that the said Somerset Railroad Company, in consideration of the engagement herein made and of one dollar to them paid by Lewis Pierce, of Portland, in the county of Cumberland, Daniel Holland, of Lewiston, in the county of Androscoggin, and Stephen D. Lindsey, of Norridgewock, in the county of Somerset, doth hereby give, grant, bargain, sell and convey to the said Lewis Pierce, Daniel Holland and Stephen D. Lindsey, and their successors in joint tenancy, the railroad of said Somerset Railroad Company, from its junction with the Maine Central railroad, in Waterville, in the county of Kennebec, to its terminus in Solon, in the county of Somerset, and situate in the counties of Kennebec and Somerset with the franchise of said company, and all its real estate, and all its personal property of every nature used in connection with its said railroad, now possessed or to be hereafter acquired.

To have and to hold the aforegranted and bargained premises with all the privileges and appurtenances thereof, to said grantees and their successors in joint tenancy forever, but in trust nevertheless as hereinafter provided. And the said Somerset Railroad Company, doth hereby covenant with the said grantees and their successors, that it has good right to sell and convey all the property aforesaid, that the same is free from all incumbrances, and that it will warrant and defend the same to said grantees and their successors, against the lawful claims and demands of all persons. Provided, however, if the said company shall pay said bonds and coupons as they severally become due, and do and perform all on their part to be done and performed as hereinafter stipulated, this deed shall be null and void, otherwise in full force.

110 This conveyance is made to said grantees for the benefit of the holders of the bonds of said company to be issued as herein provided upon the trusts and stipulations following:

First. Said grantees hereby accept said trust and hereby covenant with said company to perform it faithfully according to the stipulations of this deed and the provisions of law. Second. It is agreed that said company shall keep said property in good repair. Third. Any omission of said company to pay any of said bonds or coupons as they become due or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges *prima facie* of said breach of condition; and said company shall submit without resistance to any act of theirs for such purposes not being bound by their judgment in a final trial and decision respecting a breach of condition. Fourth. Said company shall be entitled to the possession and management of said property until breach of condition of this mortgage, and also in case of breach of condition where subsequent performance by it is accepted. Fifth. Said trustees shall in no event be personally liable for the doings of each other. Each is to be accountable for his own misdoings only. A majority of them

may do any act herein provided for when it appears that the other had notice and declined to act or omitted to attend a meeting duly notified when that matter was to be under consideration.

It is further agreed that said company, may in its discretion, sell, exchange or otherwise dispose of any or all locomotives, tenders, cars, rolling stock, tools and materials, and all other personal property which may become impaired by use, or require renewal, and convey the same free and clear of all lien of this mortgage but all property of whatsoever kind whether real or personal obtained in place of property sold or disposed of as aforesaid or otherwise acquired hereafter by said company shall be and become subject to, and bound by the lien of this mortgage, as if it were now owned by it and especially described herein.

111 It is further agreed that said railroad company shall at the request of the trustees, execute and deliver, such further deeds of conveyance of all property now possessed or to be hereafter acquired by said company, herein conveyed or intended to be conveyed, and upon the trust herein set forth, as may be necessary for the better security of said bonds.

It is hereby agreed that either of said trustees may resign, such resignation to take effect sixty days after notice thereof in writing to said company and to his cotrustees.

In witness whereof, the Somerset Railroad Company has caused this deed to be subscribed in its behalf, by Francis W. Hill, president of said company, and countersigned by George A. Fletcher, its treasurer, and its seal affixed, and the said Francis W. Hill and George A. Fletcher, have hereunto set their hands and seals, this first day of July, A. D. 1871.

FRANCIS W. HILL, [SEAL.]

President of Somerset Railroad Company.

Countersigned:

GEORGE A. FLETCHER, [SEAL.]

Treasurer of Somerset Railroad Company.

SOMERSET, ss:

JULY 1st, 1871.

Personally appeared Francis W. Hill, president of the Somerset Railroad Company, and acknowledged this instrument by him signed in his said capacity, to be his free act and deed in his said capacity.

Before me—

JOHN H. WEBSTER,
Justice of the Peace.

P. D. BOYD, witness to—

LEWIS PIERCE. [SEAL.]

W. A. PEDGIN, witness to—

DANIEL HOLLAND, [SEAL.]

STEPHEN D. LINDSEY. [SEAL.]
Trustees.

Witness to signature of S. D. Lindsey:

EDWARD ROWE.

KENNEBEC, ss :

Received August 31, at 12 h. 40 m. p. m., 1872. Entered and compared with the original by—

Attest :

P. M. FOGLER, *Register.*

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REGISTRY OF DEEDS, KENNEBEC COUNTY,
AUGUSTA, MAINE, *March 26, 1883.*

I, Prentiss M. Fogler, register of deeds, in and for the county of Kennebec, in the State of Maine, do hereby certify that the foregoing instrument is a true and correct copy from the records of this office as recorded in Book 290, page 319.

Attest :

PRENTISS M. FOGLER,
Register of Deeds.

STATE OF MAINE, }
Kennebec, } ss :

To the Somerset Railroad Company, a corporation established by law and having a place of business at Oakland, in the county of Kennebec, Greeting :

We command you that you appear before our supreme judicial court, next to be holden at Augusta, within and for the county of Kennebec, on the first Tuesday of June next, then and there to answer to a bill of complaint exhibited against you by Reuben B. Dunn, of Waterville, in the county of Kennebec, John Ayer, of Oakland, in said county, and the Dunn Edge Tool Company, a corporation established at Oakland, aforesaid, who bring this suit in behalf of themselves, and such other owners of the bonds as choose to become parties hereto, and to do and receive what our said court shall then and there consider in that behalf.

And we further command you and each of you to file with the clerk of said court, within thirty days after the service hereof, your demurrer, plea or answer to said bill.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, Artemas Libbey, justice of our said court, the twenty-fourth day of April, in the year of our Lord 1883.

A. C. OTIS, *Clerk.*

A true copy.

Attest :

W. S. CHOATE, *Clerk.*

113 KENNEBEC COUNTY :

Supreme Judicial Court.

THE DUNN EDGE TOOL COMPANY *et als.* }
vs. } In Equity.
SOMERSET RAILROAD COMPANY.

This case came up for hearing at the term of said court held in and for said county, on the third Tuesday of October, A. D. 1884,

when the respondents' demurrer to the bill of complaint was overruled, and it appearing to the court that the several allegations in the bill of complaint were true, it was ordered, adjudged and decreed that upon the defendants paying the amount of coupons then overdue as particularly alleged in said bill, on or before the first day of July, A. D. 1885, said complainants take nothing by their said bill.

But in default of said defendants paying the amount of said coupons as aforesaid, by the time aforesaid it was ordered and decreed that the said defendants do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to said mortgaged premises.

And now on this thirty-first day of March, A. D. 1887, it appearing that said respondents did not within the time aforesaid, and have not since paid the amount of said overdue coupons, nor any of them—

It is ordered and decreed that said defendants be now absolutely debarred and foreclosed of and from all right of redemption, of, in and to said mortgaged premises, under the mortgage thereof made to said Lewis Pierce, Daniel Holland and Stephen D. Lindsey, dated the first day of July, A. D. 1871, as alleged in the bill of complaint.

CHARLES DANFORTH,

Judge of Supreme Judicial Court.

DRUMMOND & DRUMMOND, *Solicitors.*

April 1, 1887. Filed.

A. C. OTIS, *Clerk.*

A true copy of decree.

Attest :

W. S. CHOATE, *Clerk.*

114 STATE OF MAINE, }
Kennebec, } ss :

At the supreme judicial court, begun and holden at Augusta, within and for the county of Kennebec, on the first Tuesday of March, being the first day of said month, anno Domini, 1887.

By the Hon. Artemas Libbey, a justice of said court.

THE DUNN EDGE TOOL CO. }
vs. } 23. In Eq.
SOMERSET R. R. CO. }

Drummond & D. B., B. & C.

Apr. 24, 1883.—Filed and subpoena iss'd returnable to June rule day.

June 5, 1883.—Baker, B. & C. enter their appearance.

July 3, 1883.—Def'ts file demurrer.

Oct. T., 1884.—12. Dem'r overruled. Decree of foreclosure of mortgage unless redeemed before July 1, 1885, reserving to def'ts the right to move at next term to open decree and except to overruling of dem'r. Parties waive all objection to the presiding judge on account of interest in subject-matters.

April 1, 1887.—Final decree filed. Recorded vol. 48, page 5.

A true copy of docket entries.

Attest:

W. S. CHOATE, *Clerk*.

Plaintiffs also offers in evidence copy of mortgage of the Somerset railway to Joseph R. Bodwell and others, trustees, dated October 15, 1887, as follows:

Whereas the Somerset railway, a corporation established by law, in accordance with a vote of its stockholders at a meeting thereof, held at Oakland, on the twenty-second day of June, A. D. 1887, and at a meeting of the directors of said company, held at Oakland, on the first day of October, A. D. 1887, authorized the issue of its bonds to an amount not exceeding in the whole two hundred and twenty-five thousand dollars, payable at Boston in the Commonwealth of Massachusetts, and at the treasurer's office of said company, in thirty years from the first day of July, 115

A. D. 1887, with interest at the rate of five per cent. per annum, payable semi-annually, in Boston, and at the treasurer's office of said company aforesaid, according to the coupons annexed to each bond, each of which bonds is to be signed by the president and treasurer of said company in its behalf and countersigned by two at least of the trustees hereinafter named, now for the purpose of securing the bonds aforesaid, and the coupons thereunto annexed.

Know all men by these presents that the said Somerset railway in consideration of the engagement herein made, and of one dollar to them paid by Joseph R. Bodwell, of Hollowell, in the county of Kennebec, Edmund F. Webb and Everett R. Drummond, both of Waterville, in said county, doth hereby give, grant, bargain, sell, and convey to the said Joseph R. Bodwell, Edmund F. Webb and Everett R. Drummond and their successors, in joint tenancy, the railroad of said Somerset railway from its junction with the Maine Central railroad, in Oakland, in the county of Kennebec, to its terminus in Bingham, in the county of Somerset, and situate in the counties of Kennebec and Somerset, with the franchise of said company and all its real estate, and all its personal property of every nature used in connection with its said railroad, now possessed or to be hereafter acquired.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to said grantees and their successors, in joint tenancy forever, but in trust, nevertheless, as hereinafter provided; and the said Somerset railway doth hereby covenant with the said grantees and their successors, that it has good right to sell and convey all the property aforesaid,

that the same is free from all incumbrances, and that it will warrant and defend the same to said grantees and their successors, against the lawful claims and demands of all persons. Provided, however, if the said company shall pay said bonds and coupons as they severally become due, and do and perform all on their part to be done and performed, as hereinafter stipulated, this deed shall be null and void, otherwise remain in full force.

This conveyance is made to said grantees for the benefit
116 of the holders of the bonds of said company to be issued as herein provided upon the trusts and stipulations following:

First. Said grantees hereby accept said trust and hereby covenant with said company to perform it faithfully according to the stipulations of this deed and the provisions of law.

Second. It is agreed that said company shall keep said property in good repair.

Third. Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges *prima facie* of said breach of condition, and said company shall submit without resistance to any act of theirs, for such purposes, not being bound by their judgment in a final trial and decision respecting a breach of condition.

Fourth. Said company shall be entitled to the possession and management of said property until breach of condition of this mortgage, and also in case of breach of condition where subsequent performance by it is accepted.

Fifth. Said trustees shall in no event be personally liable for the doings of each other, but each is to be accountable for his own misdoings only; a majority of them may do any act herein provided for when it appears that the other had notice and declined to act or omitted to attend a meeting duly notified, when that matter was to be under consideration.

Sixth. It is further agreed that said company may in its discretion, sell, exchange or otherwise dispose of any or all locomotives, tenders, cars, rolling stock, tools and materials, and all other personal property which may become impaired by use, or require renewal, and convey the same free and clear of all lien of this mortgage, but all property of whatever kind, whether real or personal, obtained in place of property sold or disposed of as aforesaid, or otherwise acquired hereafter by said company shall be and become
117 subject to, and bound by the lien of this mortgage, as if it were now owned by it and especially described herein, and if personal property, shall be deemed when acquired to be attached to said real estate.

Seventh. It is further agreed that said railroad company shall at the request of its trustees, execute and deliver such further deeds of conveyance of all the property now possessed or to be hereafter acquired by said company, herein conveyed or intended to be con-

vayed, and upon the trust herein set forth, as may be necessary for the better security of said bonds.

Eighth. It is hereby agreed that either of said trustees may resign; such resignation to take effect sixty days after notice thereof in writing to said company, and to his cotrustees.

In witness whereof, the Somerset railway has caused this deed to be subscribed in its behalf by John Ayer, president of said company, and countersigned by Abner R. Small, its treasurer, and its seal affixed, and we, the said Joseph R. Bodwell, Edmund F. Webb, and Everett R. Drummond, in token of our acceptance of said trust have hereunto set our hands and seals, this fifteenth day of October, A. D. 1887.

(Signed)

JOHN AYER,

President Somerset Railway.

Countersigned:

ABNER R. SMALL,

Treasurer Somerset Railway.

JOSEPH R. BODWELL,

[SEAL.]

EDMUND F. WEBB,

[SEAL.]

EVERETT R. DRUMMOND,

[SEAL.]

Trustees.

KENNEBEC, ss:

OCTOBER 15, 1887.

Personally appeared John Ayer, president of the Somerset railway, and acknowledged this instrument by him signed in his said capacity to be the free act and deed of said corporation.

Before me—

(Signed)

GEORGE W. FIELD,

Justice of the Peace.

118 KENNEBEC, ss:

REGISTRY OF DEEDS.

Received October 17, 1887, at 4 h. 10 m. p. m. and recorded in Book 366, page 423.

Attest:

P. M. FOGLER, *Register.*

SOMERSET, ss:

REGISTRY OF DEEDS.

Received October 21, 1887, at 8 h. a. m. and recorded in vol. 193, page- 238, 239, 240.

Attest:

W. H. EMERY.

I certify that this — the only deed of trust, mortgage or indenture of the Somerset railway on record in this office.

Skowhegan, Maine, March 28, 1889.

W. H. EMERY.

KENNEBEC, ss:

REGISTRY OF DEEDS.

I hereby certify that the within instrument is the only deed of

trust, or mortgage or indenture of the Somerset railway, which appears of record in this office.

Augusta, March 28, 1889.

Attest:

P. M. FOGLER, *Register*.

Plaintiff also offers in evidence the stenographer's report of the testimony of A. R. Small, given in the petition of the Inhabitants of Anson *et als.* for the appointment of trustees, as follows:

A. R. SMALL, called by the Somerset railway, testified:

Residence, Oakland, and treasurer of the Somerset railway. I was treasurer of the Somerset Railroad Company, being elected in 1878. I continued treasurer of that corporation until its demise in August, 1883, and was then elected treasurer of the Somerset railway and have continued in that office from that time to the present.

Q. What was the financial condition of the Somerset Railroad Company in 1883 when the new corporation was formed.

Mr. STEWART: I assume that the coupons were not paid.

Q. As treasurer did you have any means belonging to the corporation with which to pay the coupons on the bonds?

119 A. I had not.

Q. State why you did not pay the coupons on the bonds as they matured.

A. For the want of funds.

Q. Have you in your possession the old Somerset Railroad Company bonds that have been turned into the new company, the Somerset railway, and converted into stock?

A. I have.

Q. How many in par value were there of the bonds of the old Somerset Railroad Company?

A. \$450,000 of principal.

Q. At the time of the foreclosure in 1883 what did the coupons on them amount to, or about how much?

A. The books clearly show there is a total of \$736,000.

Q. Of overdue coupons?

A. No, that includes the whole, everything to August, 1883, when the interest ceased.

Q. How many of the old bonds of the \$450,000 have been converted into the new stock of the Somerset railway?

A. \$339,400.

Q. How many bonds are now outstanding?

A. \$110,600. The new capital stock of the Somerset railway paid in at present is \$552,200, and the rest of it would be the other bonds with the interest, if they ever came in.

Cross-examination:

I was not treasurer when the original bonds under the mortgage of July 1st, 1871, were made and signed. I was elected in 1878

The number of bonds actually signed, as I understand it, originally, was \$450,000.

Q. Now have you any personal knowledge of how many of that \$450,000 of bonds were actually sold and money raised on them by a sale in the market?

A. All that came into my hands, but I cannot name the exact amount; but the records show that thousands had been sold and the money raised. After that they were sold by authority of the board of directors, and the proceeds passed through my hands. Think I was elected in 1878. The unsold bonds came into my possession. I received all of them that were in the office safe.

Q. Now at that time how many bonds were there that were signed and executed and ready for sale but had not been actually disposed of?

A. I cannot give you the exact number, but over \$300,000 I think; but I may have to correct that.

Q. Are you confident that there was more than a hundred thousand dollars of those bonds in a nominal amount that were not sold at that time?

A. Yes, sir; I am confident there was that much not sold, and I think a good deal larger sum than that.

Q. Now to your knowledge who bought and paid for any of those bonds afterwards, and how much did they pay for them?

A. I could not answer you correctly without the books; I could tell by them. I could tell by the books to whom I disposed of them. I cannot tell how many I disposed of. Nobody disposed of any but myself, to my knowledge. They were all in my possession. Don't mean that I could bargain for the sale of them, but that the directors did that, and directed me how to dispose of them. I don't remember how much money I actually received for the sales of those bonds after I became treasurer. The records I am sure will show that, and show who had the bonds and who paid for them.

Redirect:

I have the numbers of the old bonds sold by myself and the names of the persons who had them. The Somerset railway issued their bonds in 1888.

Plaintiff also offers in evidence the deposition of Josiah H. Drummond, given in the proceedings for the appointment of trustees, as follows:

121 JOSIAH H. DRUMMOND, of Portland:

That before the meeting of the bondholders on the fifteenth day of August, 1883, I had no conversation whatever with either Collins or Pease.

That I prepared the call for the meeting and sent it, I think, to Mr. John Ayer; that it was returned to me and purported to bear the genuine signatures of all the persons whose names are affixed to the printed call.

That, as I remember, I procured or gave directions for the publication of the notice; that I attended the meeting for the sole object of seeing that the proceedings were regularly taken.

That I never, before the meeting or at the meeting, urged or advised any parties to favor the plan.

That I had advised that such a corporation might be formed and take the road out of the hands of the stockholders and control it in the interest of the bondholders.

That I did not "approach" Mr. Collins or any one else in order to induce them to vote for the project nor to explain it.

If Mr. Collins or Mr. Pease had any conversation with me it was because they sought it, and not because I volunteered it.

That I made no statement that it was a mere matter of form, but on the contrary, I called the attention of the meeting to the statute under which the proceedings were held and told them that the effect of forming the corporation would be to take the company out of the hands of the stockholders and place the control of it in the hands of the bondholders.

That I did not know and was not informed that there was any division of opinion or any hesitation on the part of anybody who had signed the call as to the proper course to be pursued under the circumstances.

That I know that the representatives of the town of Auson took as much part in the proceedings, so far as being represented and voting is concerned, as any other persons there.

I was there to see that the proceedings were in accordance with the provisions of the statute, and I took special notice that all who signed the call and were represented took part in the proceedings and votes.

122 The foregoing testimony given subject to objection of counsel for the petitioners.

Cross-examination by Mr. CLEAVES :

Q. By whom were you employed in the proceedings in the Somerset railroad ?

A. I was first employed by Mr. John Ayer, or Reuben B. Dunn, I have forgotten which, but my bill was paid by the company formed August 15, 1883.

Q. How long have you been personally acquainted with Mr. Collins and Mr. Pease ?

A. I cannot say that I ever saw them before I saw them on that day or that I have since seen them, but I have the impression that I had seen Mr. Pease a few times.

Q. Did you make this statement at the meeting that the effect of forming the new corporation would be to take the company out of the hands of the stockholders, and place the control in the hands of the bondholders ?

A. I did.

Q. You have no knowledge as to the genuineness of the signatures to the call ?

A. Yes, I knew the signature of quite a number who signed the call, but I did not know the signature of Mr. Collins or Mr. Pease.

Q. Do you recollect the distinct part that each person took who claimed to represent bondholders?

A. No, except as to some particular parts of the proceedings.

Q. Was your proxy from Mr. Thompson filed with the Somerset railroad?

A. I am unable to state. If it was called for, it was filed, but I do not remember that the proxies were called for.

Q. When was that proxy given you?

A. I cannot remember.

Q. Do you remember where it was given you?

A. It was sent to me by mail. Mr. Thompson was an old client of mine.

123 Q. Did you ever see the bonds held by him?

A. Yes, I had had them in my possession a long time.

Q. Did you have them in your possession at the time of this re-organization in 1883?

A. They were on deposit at Oakland, and I took them from their depository and used them at the meeting and returned them to the depository again, by his orders.

Q. Do you know what he did with the bonds afterwards?

A. I do not.

Q. Will you produce the proxy given by Mr. Thompson?

A. I cannot now. I have a large pile of papers relating to this matter, and it is possible that it is among those papers, but it would take a good while to examine them and I have not looked for it.

Q. Please examine and see if it can be found.

A. In answer to that I will say, that it would take probably three or four hours, and I do not feel called upon to do that.

Plaintiff also offers the stenographer's report of the testimony of Albert Moore, a witness called by the Somerset railway in the proceedings for the appointment of trustees, as follows:

ALBERT MOORE, called by the Somerset railway, testified:

Residence, Anson, where I have always lived, seventy-six years. Now run a weekly newspaper, called the Union Advocate. Have edited a newspaper almost thirty-six years. I have here a copy of the paper containing the petition or call, headed, "The Somerset Railway Company," and signed by Reuben Dunn *et als*. The date of the paper is August 8th. I don't know how many weeks that notice was published in the paper. I usually print from two to three weeks.

Q. Has there ever been any public meeting held in Anson, in relation to its interest in the Somerset Railroad Company since the first start?

A. None only in the getting up of the road.

124 All objection to the authority of the treasurer of the Somerset Railway Company to bring the present bill and to sign the same is waived by counsel for the defendants.

JOSIAH H. DRUMMOND, having been duly sworn in behalf of the plaintiff, testified :

Direct examination by E. F. WEBB, Esq. :

Q. State your name, residence and occupation.

A. Josiah H. Drummond ; residence, Portland ; occupation, lawyer.

Q. Whether or not you were at any time counsel for the Somerset Railroad Company ? If yes, from what time to what time ?

A. I was counsel, but I cannot tell you from what time.

Q. From soon after its organization in 1872 ?

A. I do not remember. I was consulted frequently from its organization clear down to 1883.

Q. Whether or not you participated in the organization known as the Somerset railway, and, if yes, state what was the nature of your participation, in general terms ?

A. Well, I did. I acted as counsel and proxy for parties in the organization.

Q. Whether or not you were the general counsel for the company, or bondholders, in the organization of the new corporation called the Somerset railway ?

A. I acted at that meeting as counsel for parties interested so far as I knew them in the organization of that company as well as proxy for one of the bondholders.

Q. Whether or not, as counsel, you had charge of the organization of the new company for a majority of the bondholders of the old Somerset Railroad Company ?

A. I did.

Q. Whether or not you have the original petition of the bondholders for the organization of the new company ?

A. I have ; I hold it in my hand.

Q. Whether or not you are familiar with the signatures of the signers to that petition ?

125 A. I will read those that I am familiar with. I knew the signature of Reuben B. Dunn, the Dunn Edge Tool Company by R. B. Dunn, president, John Ayer, S. S. Thompson, F. W. Hill, C. A. Harrington, one of the selectmen of Norridgewock, B. P. J. Weston, W. H. Brown, and I have some acquaintance with the signature of Edwin Collins, one of the selectmen of Anson. Those of whose signatures I have no knowledge are John Heald, E. W. Tobey, one of the selectmen of Norridgewock, F. J. Watts, W. W. Pease, the latter being one of the selectmen of Anson.

Q. Did you prepare that petition for the signatures of those persons ?

A. I did, although the list is not in my handwriting.

Q. Whether or not the paper from which you have been testifying was present at the meeting of the bondholders at Oakland ?

A. It was.

Q. Whether or not there was any notice of that petition given, and, if you know what the notice was, please to state ?

A. The notice was published in the paper at North Anson, the Union Advocate, and in the Kennebec Journal.

Q. Did you or not take charge of publishing the notice in either or both papers?

A. I sent them to both papers, had proof returned to me for correction, and corrected them, had revised proofs sent to me for examination and sent them back, and had the papers with the notice as corrected sent to me and had them in my possession. I simply say the signature of Mr. Thompson to that paper, to the original petition which I have described, is genuine. I have compared this original paper with the copy in my record book, as printed in the old case, and it is correct. I have compared the notice of that meeting of the bondholders as recorded in the record with the notice published in the newspaper, and the copy in the record is a correct copy of the notice published.

Q. When you organized the new company call the Somerset railway, who were your clients? Who employed you?

A. I was first employed by John Ayer, or Reuben B. Dunn in behalf of themselves and the Dunn Edge Tool Company. I was also employed in behalf of the old Somerset Railroad Company.

126 Q. Can you state the year that you commenced the preliminary proceeding of organizing the Somerset Railway Company?

A. The latter part of 1882.

Q. Did you know Stephen D. Lindsey, of Norridgewock, in his lifetime?

A. I knew him very well.

Q. Was he a trustee of the Somerset Railroad Company?

A. He acted as such.

Q. Did he take any part, or participate in the organization of the new company called the Somerset railway?

A. He did, and in the proceedings preparatory to it. I can state that very briefly.

Q. I wish you would state what part he took.

A. There was a meeting of the stockholders of that company held in July, 1883, at Oakland as I understood it. I was not present. I am wrong; it was not July, it was in June, 1883. I received this letter from Stephen D. Lindsey, which I will read.

"NORRIDGEWOCK, June 13, 1883.

BRO. DRUMMOND: At a meeting of stockholders of Somerset R. R. today it was voted to submit certain questions touching claims of directors for services and disbursements, and also touching rights of stockholders and bondholders to possession, etc., to a committee composed of yourself, F. W. Hill, Albert Moore, S. S. Thompson and myself. It would suit other members of the committee to meet in Portland on Thursday, 21st inst. if that day would suit your convenience. Will you please inform me if you can attend to the matter on that day, and if not indicate a time when you can, naming the day as early as Thursday in the week, if possible, for the convenience of Mr. Thompson. The meeting adjourned four weeks to await action of this committee. If some mode can be devised to put road in hands of bondholders immediately, stop all litigation and shut down

on the old claims, I think there would be an acquiescence on the part of all interested.

Truly yours,

S. D. LINDSEY."

127 I also received this letter of June 15th :

" NORRIDGEWOCK, June 15th, 1883.

Bro. Drummond :

Yours of yesterday rec'd. Have notified other members of committee to meet at your office afternoon of Thursday, 21st inst. I think there can be no impropriety in your acting, and I hope some measures may be devised to avoid the complications that exist and get the possession of road in hands of bondholders.

Truly yours,

S. D. LINDSEY."

That meeting was held that afternoon at the time fixed.

Q. Were the matters referred to in the letter considered ?

A. Yes.

Mr. STEWART: This testimony all goes in *de bene esse*.

WITNESS: I said the committee met. I do not have any positive, actual remembrance of Albert Moore's being there ; but I do remember that Thompson was there, Hill was there and Lindsey was there, and my impression is Moore was there.

Q. After considering the matter did the committee make a report in writing to the Somerset Railroad Company ?

A. They did. I will read another letter which I received :

" NORRIDGEWOCK, July 7, 1883.

Bro. Drummond :

Have you drafted papers for organization of bondholders Somt. R. R. ? The stockholders own the major part of bonds, and I hope at meeting next week we may initiate measures to obtain possession and run new road in interest of the bonds. I think if we can have the papers at the meeting next week, a majority of bondholders will be present and sign.

Truly yours,

S. D. LINDSEY."

Q. Have you any further letters ?

A. Yes ; I have a further letter from Mr. Lindsey, as follows :

128

" NORRIDGEWOCK, July 9, '83.

Bro. Drummond :

The report has not got round and I send you draft, which please examine, correct, or add to and return to me by Tuesday evening. Meeting next Wednesday.

Truly yours,

S. D. LINDSEY."

Q. Are those all the letters that you have from Mr. Lindsey relating to the organization, prior to the organization ?

A. Yes, sir.

Q. Have you any knowledge of the report that was made by the committee of which you were a member?

A. I signed it.

Q. Do you know where that report is?

A. Some of the counsel in this case have got it. I had it yesterday; Major Small had it. I can say in terms (and put it in later and save time) that the report was drafted by Mr. Lindsey and signed by all the committee, including Mr. Thompson, Mr. Moore, Mr. Hill and myself and Lindsey. It was signed by them all. It is copied on the record book. I will produce the report.

Q. Whether or not at the meeting of the bondholders you called the meeting to order?

A. Yes.

Q. Who was elected moderator?

A. I should have to tell from the record. I think Mr. Lindsey was. I know he was there and acted, and I think he was moderator of the meeting, but I am not certain.

Q. Do you know whether Mr. Lindsey had and presented there some bonds of the Somerset Railroad Company that participated in the organization of the Somerset railway?

A. He did, one bond as I recollect it.

By Mr. STEWART:

Q. You say Mr. Lindsey had one bond?

A. Yes.

By the SAME:

Q. Do you mean his own?

A. He appeared with one bond in his possession, and had it at the meeting, I mean.

129 Q. Did you present the bonds of the old Somerset Railroad Company at the meeting?

A. I did.

Q. Will you state in relation to that?

A. On account of an error that a gentleman for whom I have a very high respect has made I would like to state a little further, but briefly. Sumner S. Thompson had a claim against the Somerset Railroad Company which I prosecuted for him. It was sued, I will state generally, in the United States court. On the 24th of August, 1872, by his authority I settled the case upon the receipt from the Somerset Railroad Company of \$25,000 in bonds of the 1871 mortgage. Those bonds remained in my possession, in my box in the safety vault, after the safety vault was built, several years. Mr. Thompson brought some others here and put them with them. The amount that he brought here and put with them I cannot state.

Q. Where did Mr. Thompson reside?

A. At Lyndonville, Vermont.

By Mr. STEWART :

Q. You mean he gave you other bonds?

A. Others that were put in the safe with them. One of the \$25,000 bonds I took, by an arrangement with him, towards my fees and disbursements in the case and for services. And I may as well say here that I afterwards sold that bond to Mr. Dunn, so it did not go back into Thompson's custody. I collected the coupons of such as were paid and remitted to him.

Q. On the bonds that he had left with you?

A. On the bonds that he had left with me.

By Mr. STEWART :

Q. On this bond while you held it?

A. On this \$500 bond.

By SAME :

Q. It was for \$500?

A. That was a \$500 bond which I took as pay and which I sold Mr. Dunn. I collected two or three coupons on it.

By SAME :

Q. On his \$25,000?

A. Whatever I had with me. A memorandum which I have rather indicates there was \$28,000 in round numbers, but I can't state that definitely. Those bonds remained in my possession quite a number of years, in my box. There came a proposition from

130 Mr. Dunn to purchase those bonds, which I transmitted to Mr. Thompson, but no sale of them was effected. Thompson came later and took away a part of the bonds with a view of selling them to somebody. The remainder were left with me in my box at the safety-deposit vault. At the time the committee met in my office, he expected to be at the meeting of the bondholders when it should be called, at Oakland, that organized the new company. But, on the 30th of July, 1883, he wrote me this letter :

" JULY 30TH, 1883.

J. H. Drummond.

DEAR SIR : Will it be necessary for me to be at Waterville at the meeting of the bondholders August 15th? I hardly see how I can be there at that time. If it is necessary to have all the bonds there on that day, you can take what you have of mine and I will give you an order for some on the bank at Waterville. Please write me.

Yours truly,

S. S. THOMPSON."

Q. That is dated at Lyndonville?

A. That is dated at Lyndonville; that is in Vermont. I replied, but have no copy of the letter. To my reply I got the following letter :

"LYNDONVILLE, Aug. 11, 1883.

Hon. J. H. Drummond.

DEAR SIR: I cannot come down to your meeting on the 15 of August very well. I will send you an order for the bonds in West Waterville National bank, and you take what I have in your safe at Portland, thirteen thousand more that I intended to get but I have not had time to see the parties. I hardly think it is necessary for me to come.

Yours truly,

S. S. THOMPSON."

He also sent me a proxy to represent him at that meeting.

131 Q. You have that proxy?

A. I have not the proxy, but I have seen it within a few days. I left it with the clerk, pinned to my vote, when I voted for directors. I went down to Waterville, went to the West Waterville National bank and got the bonds. I wish to say here that the savings bank and the national bank are in the same building and, as I remember, substantially in the same office, and in reference I have sometimes confounded the savings bank with the national bank. But I got the bonds, had them present at the meeting, voted on them, and when the meeting was closed I deposited all of them in the West Waterville National bank, and for which I took the following voucher:

"WEST WATERVILLE NATIONAL BANK,
OAKLAND, ME., Aug. 15, 1883.

Hon. J. H. Drummond has this day left at this bank for safe keeping the following bonds issued by the Somerset Railroad Company, which bonds he states are the property of S. S. Thompson, viz:

Nos.	2 to 16 inclusive,	\$1,000 each.....	\$15,000
"	42 " 50 "	1,000 "	6,000
"	106 " 120 "	500 "	7,500
"	50-89-239	100 "	300
			28,800

The above does not hold this bank or any of its officers in any way responsible for the safe keeping of the above-named bonds.

GEO. H. BRYANT, *Cashier.*"

Q. You delivered the bonds described in that receipt to the bank?

A. Yes; and I never have had them since.

Q. Those were Mr. Thompson's bonds?

A. Those were Mr. Thompson's bonds.

Q. Did you vote on those bonds at the meeting of the bondholders?

A. I did. I called the meeting to order, and read the call, as I remember it, and the moderator and clerk were chosen and
132 the clerk sworn. On my motion a committee was appointed to see what bondholders were represented, and I was chairman of that committee.

Q. Do you remember whom your associates were on that committee?

A. No, not now. I did know yesterday. (Referring to a record book.) The record shows, Edward Collins and Frank Hill. I remember that Frank Hill was on the committee.

Q. State what the committee did?

A. The committee called on the gentlemen present who had bonds to present them, and the bonds were presented.

Q. What did the committee do in relation to identifying the bonds as to numbers and amounts, if anything?

A. They took a schedule of the bonds presented, taking the numbers and amounts.

Q. And by whom presented also?

A. Of the bondholders—yes, who held them. I can take the record book and refresh my recollection from that and tell you about it. I presented as proxy the Thompson bonds, \$21,000 and \$7,500 and \$300, the same as stated. Mr. Harrington and Mr. Lindsey, for the Inhabitants of Norridgewock, presented \$30,000 in bonds. Mr. Collins, or Mr. Pease, and I think Mr. Collins, or they together, had the Anson bonds.

Q. How many?

A. Well, Nos. 5, 138, 139, 201 to 207 inclusive. Thirty-four \$500 bonds were presented and fifteen hundred \$100 bonds were presented. Francis W. Hill presented ten \$1,000 bonds, and three \$100 bonds. R. B. Dunn, through R. W. Dunn, his son, presented \$28,500 in bonds,—ten \$1,000, thirty \$500 and thirty-five \$100. William H. Brown—

Q. Whether he was a member of the firm of Brown & Hilton?

A. I don't know. William H. Brown presented—my recollection is that Mr. Collins presented those in behalf of Mr. Brown, but I won't say certain, but the bonds were there and examined and the numbers taken. There were \$4,100 in amount, five \$500 and sixteen \$100. Mr. B. P. J. Weston presented twenty-three \$100 bonds. B. P. J. Weston, for Nathan Weston, presented ten \$100 bonds. I remember that distinctly, because there was a doubt for a while to which one of them a certain one-hundred-dollar bond belonged. I remember we had some discussion; I remember that very well. Nathan Wood is recorded as presenting bonds—I don't remember him—three \$100 bonds. R. Wesley Dunn presented five \$100 bonds. John Ayer presented two \$1,000 bonds. The Dunn Edge Tool Company, through Mr. Ayer, presented bonds amounting to \$214,500, one hundred and seventy-seven \$1,000, forty-eight \$500, and eighty-five \$100 bonds, making \$214,500. Edward Rowe presented one \$500, and three \$100 bonds, making \$800. Stephen D. Lindsey presented one \$100 bond. John Heald represented \$3,900; but he didn't have his bonds there, but the committee were satisfied that he had them and entered them in their report. They amounted to \$3,900. The total amount was \$354,600. Now I have still the pencil memoranda from which this report was made up.

Q. Were the bonds all reported there? Were they bodily present?

A. Except in the case of Heald the bonds were there; they were counted.

Q. How many in the case of Mr. Heald?

A. \$3,900.

Q. Did the committee take the numbers and amounts of each bond and include them in their report?

A. They did.

Q. How many of the bonds were there that signed the agreement to form the new corporation?

A. \$351,900, besides F. J. Watts. I don't know how much he had. He was not present, and the amount of his bonds were not known.

Q. Do you know how many bonds there were outstanding at that time?

A. Only by the report that there was \$450,000.

Q. Do you know whether or not at that time, and for some time preceding, two or three years, the Somerset Railroad Company was insolvent?

A. I know that, as a member of that committee I examined 134 and reported that they were insolvent. I know that none of the coupons on my bonds, or any that I held were paid for somewhere from 1875 to 1883. I know that I had claims against the Somerset railroad that I could not find any property to attach to secure. I knew those facts.

Q. Was it a part of the duty of this committee to examine into the liabilities of the company, and its financial standing?

A. To this extent: To ascertain the amount of the indebtedness and the property. We did not take up any one particular bill and examine it to see whether it was a valid bill or not, or a valid claim or not, but we took the admissions of the officers of the company in relation to that matter.

Q. Was the new corporation practically formed upon the knowledge of the fact that the old company was insolvent and was unable to go on?

A. Well, they so voted; the old company so voted at its meeting.

Q. Do you know at what time the Somerset Railroad Company ceased to pay interest, to pay its coupons upon its bonds?

A. I know that they ceased to pay the coupons upon the bonds in my custody. In 1875, either in January or July, I can't tell which, I cut the coupons off and sent them for collection, and they were not paid, but were returned.

Q. You spoke yesterday of seeing the proxy that S. S. Thompson gave you to vote upon his bonds at the meeting for organization of the company. You have not got that proxy now?

A. No. I think I can get it and produce it.

Q. To whom did you give that proxy? In whose hands did you see it?

A. Well, I attached it to my vote, and it went into the hands of

the clerk of the company, and the present clerk of the company has it in his possession.

Q. I mean particularly in whose hands did you see it yesterday?

A. I saw it in Maj. Small's hands.

Q. Whether or not the same proxy which you saw Maj. A. R. Small have yesterday was the same proxy which you used in voting on the bonds of S. S. Thompson at the meeting of the bondholders in August, 1883?

A. Yes, sir.

Q. I want to call your attention to a meeting of the stockholders of the Somerset railway in 1887, I think it was August 6th, wherein the stockholders of the Somerset railway voted upon the question of issuing a mortgage to Bodwell and others as trustee to secure the payment of \$225,000 in bonds.

A. Yes, I have the record before me in the book.

Q. Did you attend that meeting?

A. I don't think I did, although I am unable to say whether I did or not. I was expected to attend it. I drew the call.

Q. Do you know whether or not A. R. Small, the clerk or treasurer of the company, asked your professional advice as to whether the bonds held by Mr. S. S. Thompson and those held by the inhabitants of Anson should be entitled to vote upon the question of issuing that mortgage—should be permitted to vote provided they were presented for voting?

A. He did.

Q. What advice did you give him as to the right of the inhabitants of Ansen, and of S. S. Thompson, to vote upon their bonds that participated in the organization of the company and had not been converted into stock?

(Objected to.)

A. I can't say that I gave him advice with regard to those specific bonds, but he asked my opinion as to whether any others than stockholders who had actually taken their certificates of stock could vote at that meeting, and I advised him that, in my opinion, not only could they vote, but that any bondholders who had not converted their bonds into stock could vote if they presented their bonds, or satisfied the meeting that they were the holders of the bonds.

Q. Do you know whether or not the Union Advocate, in which the notice was published, as you have stated, is published in the village of North Anson?

A. It was then.

Q. Do you know whether it was the only newspaper published in the village of North Anson?

136 A. I cannot tell you. I now have the report of the committee, which I did not have this forenoon and which I alluded to in my testimony, signed by S. D. Lindsey, F. W. Hill, S. S. Thompson, Albert Moore and J. H. Drummond. (Said report read by witness. See page 44.) I identify the signatures of all of them.

Q. Upon that point, according to the investigation and examination you made at that time, whether the facts stated in that report were true?

A. Yes, sir.

Q. Whether or not that report was made to the stockholders and accepted by them?

A. It was made to be made to the stockholders. I don't remember whether it was there or not. The records show that it was made to and accepted by them, and there is this memorandum on the report: "Report read by Mr. Lindsey. Moved by Mr. Dunn it be accepted. Voted to accept it."

Q. Do you know whether Mr. Lindsey, the member of the committee, went to the office of the company at Oakland and examined the books and papers?

A. I only know what he told me. I was not with him. I have here the proxy of S. S. Thompson, which was attached to my vote. It is as follows:

"Know all men by these presents, that I, S. S. Thompson of Lyndon, Vt., do hereby substitute and appoint J. H. Drummond of Portland, to be my proxy for me and in my name and behalf to vote at any election of directors of the Somerset railroad or on any business or all other matters which at any meeting of stockholders or directors may properly come before said meetings.

Lyndonville, Vt., August 11, '83.

S. S. THOMPSON."

(By Judge SYMONDS:)

Q. That is the proxy of S. S. Thompson that you referred to this morning and said you would produce?

A. Yes; it is his genuine signature, and the vote is attached to it which I threw, by virtue of it, at that meeting. The vote is as follows: "S. S. Thompson. By Josiah H. Drummond. Bonds. 137 288 votes." (On the reverse side:) "R. B. Dunn, John Ayer, S. D. Lindsey, Edw'd Rowe, S. S. Thompson, F. W. Hill, R. W. Dunn, Wm. H. Brown, Nathan Weston."

Q. The vote for directors, was it not?

A. The vote for directors. (Producing another slip.) And there is the vote of the town of Anson, \$27,500 bonds, by Edwin Collins. I recognize that.

Q. You produce that also?

A. Yes. (Reads:) "Town of Anson, \$27,500 bonds, by Edwin Collins." (On the reverse side:) "R. B. Dunn, John Ayer, S. D. Lindsey, Edw'd Rowe, S. S. Thompson, F. W. Hill, R. W. Dunn, Wm. H. Brown, Nathan Weston."

Cross-examination by D. D. STEWART, Esq.:

Q. You think you saw those bonds, the Anson bonds?

A. Yes.

Q. You — confident of that?

A. Yes, I should be confident in two ways: I remember it, and,

in addition to that, I ruled that we could not report any bonds unless they were produced there, unless the specific bonds were produced there.

Q. It seems you reported \$3,900?

A. Yes, reported them, but they were not there and we didn't get their numbers.

Q. That appears already?

A. Yes.

Q. Won't you be kind enough to state the names of all persons who employed you in any way in connection with these proceedings?

A. Do you mean persons as distinguished from corporations?

Q. Yes, I mean all the persons who employed you to act as counsel in any of these proceedings connected with the Somerset Railroad Company, and all these matters that you have spoken of—the names of the persons who employed you to act?

A. John Ayer, Reuben B. Dunn and S. D. Lindsey employed me to act in behalf of other gentlemen also who consulted and conferred with me about it.

Q. My inquiry is broad enough to include not only the agents but the principals.

A. Well, I was employed in behalf of the Dunn Edge Tool Company, S. S. Thompson, F. W. Hill and I think I had one conversation with Mr. B. P. J. Weston in which it was assumed that I was acting for him with the others.

Q. Now these are all the persons by whom you were consulted in your employment, if I understand it now, for the old company and for the new company?

A. Yes, and the bondholders. I understood Mr. Stewart to come right at it—

Q. I am not asking what you understood, but I am asking the names of the persons who actually employed you, so far as you know?

A. So far as I know I was employed—if you say by agent or principal—in behalf of the bondholders that were represented at the meeting.

Q. That is not my question. My question is as to the names of all persons that employed you, or retained you, or consulted you about the affairs of the old Somerset Railroad Company, or of the new company, so far as you can remember?

A. Well, I should add Mr. Edward Rowe. There were others whose names I cannot remember.

Q. By the term "others" you mean other bondholders, I suppose?

A. Yes, other bondholders; but you asked me the names of the persons, so I put it that way.

Q. Now, the names of these persons that you have given I suppose, or sort of assume, include or cover the names of all persons that employed you in relation to the old Somerset Railroad Company?

A. Well, I can't tell you; I can't answer that.

Q. Do you remember any others than those that you have named?

A. Do you mean at that particular time, or away back?

139 Q. Your attention and mine both have been called to the matters perhaps from 1875 down to 1883.

A. Well, I had consultations with various of the directors, whose names I can't tell you, of the Somerset Railroad Company during that time. I remember one there; I don't know that I can say that he employed me except as it was under the general statement.

Q. Won't you name the directors whom you remember having consultations with from 1875 down to 1883?

A. I cannot.

Q. Can you remember anybody else except those you have stated?

A. I cannot; as directors I think not. Bro. Harrington, of Norridgewock, talked with me quite a number of times. That was in 1883. That was C. A. Harrington.

Q. Do you remember of conferring with anybody as directors of the old Somerset Railroad Company except either Mr. Ayer or Mr. Dunn?

A. No, I do not; but I do remember that I met with Mr. Ayer and Mr. Dunn and other directors of that road whose names I cannot remember, during the period you mention. I am very certain with Mr. William H. Brown, but I would not swear positively.

Q. Won't you give the names of the directors as they were in 1878 and 1879, if you can remember?

A. I cannot.

Q. Well, the names according to your best recollection?

A. I could not give you more than two or three of them; and I cannot tell you whether Mr. Hill was one or not all the time. Mr. Frank W. Hill was a director at times, Mr. Reuben B. Dunn was a director at times, John Ayer was a director at times, and Mr. Rowe was a director at times.

Q. You have got the records?

A. No, not of the old railroad.

Q. Mr. Webb has them. (Records produced.) Will you begin back to 1875 and give the names of the directors right
140 down to 1883? What were the names of the directors of the old Somerset Railroad Company for 1875?

A. At the annual meeting in June, 1875, there were elected Edward Rowe, Nathan Weston, John Ayer, W. H. Brown, William Atkinson, Nicholas Smith, John Carney, F. W. Hill, Benjamin Flint, R. B. Dunn and Samuel Bunker.

Q. Now in 1876?

A. Edward Rowe, Nathan Weston, John Ayer, William H. Brown, William Atkinson, Nicholas Smith, John Carney, F. W. Hill, Benjamin Flint, R. B. Dunn, Samuel Bunker. Before I forget it, I would like to add to my former answer that during those years from 1875 down to 1880, I had numerous talks about those matters with William Atkinson. I had forgotten him.

Q. Now the directors in 1877?

A. John Ayer, William H. Brown, William Atkinson, Nicholas Smith, John Carney, R. B. Dunn, Benjamin Flint, W. W. Pease, O. H. McFadden, S. B. Cragin.

Q. Now for 1878?

A. In 1878, Edward Rowe, Nathan Weston, John Ayer, William Atkinson, William H. Brown, Nicholas Smith, John Carney, R. B. Dunn, F. W. Hill, B. Flint. There were two others that had two votes, but they were not elected.

Q. Now 1879?

A. Edward Rowe, Nathan Weston, John Ayer, William Atkinson, William H. Brown, Nicholas Smith, John Carney, R. B. Dunn, W. W. Pease, Albert Moore and O. H. McFadden. There were two then who did not have votes enough.

Q. Now in 1880?

A. Edward Rowe, Nathan Weston, John Ayer, Albert Moore, Nicholas Smith, John Carney, R. B. Dunn, William H. Brown, William Atkinson, W. W. Pease and Benjamin Flint.

Q. Now in 1881?

A. Edward Rowe, Nathan Weston, John Ayer, William H. Brown, William Atkinson, John Carney, R. B. Dunn, W. W. Pease, Albert Moore, F. W. Hill and G. T. Stevens.

Q. In 1882?

A. Edward Rowe, Nathan Weston, John Ayer, William H. Brown, John Carney, R. B. Dunn, W. W. Pease, Albert Moore, G. T. Stevens, F. W. Hill and Calvin F. Walker.

Q. Now in 1883?

A. John Ayer, R. B. Dunn, Edward Rowe, George E. B. Jackson, S. D. Lindsey, S. S. Thompson, William H. Brown, Albert Moore, F. W. Hill, Nathan Weston, Calvin Walker. Calvin Walker is the name, because they have put in here, "The votes cast last year were intended for Calvin Walker, the present incumbent. Omission of the 'F.' this year." It seems his name was really Calvin Walker. That is the meeting at which this report which has been put in was made and accepted. The report which has been put in was made and accepted at that meeting.

Q. Now in 1884?

A. John Ayer, R. B. Dunn, Edward Rowe, W. H. Brown, Nathan Weston, F. W. Hill, R. B. Dunn, S. S. Thompson, C. A. Harrington, G. E. B. Jackson and Albert Moore.

Q. There was no election after 1884, by the old stockholders?

A. I don't see any more there. There are none in the book.

Q. You say you sold your bond to Mr. Dunn?

A. Yes.

Q. When?

A. I can't tell you.

Q. About when?

A. I can't tell you that, Mr. Stewart.

Q. Your five-hundred-dollar bond?

A. Yes. I can't tell you when. I know what I got for it, but I can't tell you when it was.

Q. What did you get for it?

A. Thirty-three and one-third per cent. of the face of it. I got one hundred sixty-six, sixty-seven. That is as I recollect it.

Q. Now you had it when? What year did you have it?

A. Well, I had it with Mr. Thompson's bonds in 1872. I find on my book a memorandum that I agreed to take that \$500 bond in full for services and the whole thing and call it square and discount the rest of my account; but I had taken that bond in 1872 and given him credit for it.

Q. When was this memorandum made that you refer to?

142 A. It has no date.

Q. About when, as near as you can tell, did you have the bond, that is, when it became your property?

A. It became my property, by an understanding with Thompson, on August 24, 1872.

Q. I was only inquiring about the possession of the bond in order to get at the time when you sold it?

A. I can't tell you.

Q. How long was it before this meeting in 1883?

A. I can't tell you; it was before it.

Q. It was before the meeting in 1883?

A. Yes, I suppose it was, but I can find my old cash book; I could hunt that up, but it was before 1883.

Q. Now you stated that Mr. Dunn made Mr. Thompson a proposition as to what he would pay for his bonds?

A. Yes.

Q. What was the amount he offered Thompson?

A. I can't tell you.

Q. Do you mean by that that you have not any recollection?

A. I haven't the slightest recollection about it. I remember it, and my recollection is refreshed by the letter which I had from Thompson saying he didn't know whether to take it or not.

Q. But you haven't really any recollection of what it was?

A. No; I dismissed it from my mind; nothing came of it.

Q. You cannot remember what Dunn's offer to Thompson was?

A. No; I cannot.

Q. Now I want to inquire if you did not attend the session of the legislature and procure, or assist in procuring, the passage of the act of March 11, 1887. The act of March 11, 1887, professes to be an amendment to chapter 83, relating to railroads. It transfers virtually the whole title of the road from the trustees to the mortgagor?

A. I don't know as it does that; but it is pretty safe to say that if there was any legislation affecting railroads in the legislature of 1887, I knew about it and didn't oppose it.

143 Q. My inquiry is if this original bill is not in your handwriting?

A. I can't tell you; it may be; it very likely is.

Q. My inquiry is whether you did not prepare the bill which resulted in the law of March 11th, 1887, and urge its passage before the judiciary committee?

A. I don't recollect.

Q. You don't mean to say you didn't?

A. No. I mean to say it is very likely I did; but I have to draw it from inference, from these other matters.

Q. Now I want to inquire if you didn't draw and procure the passage or urge the passage of the original bill which authorizes the foreclosure of railroad mortgages by a bill in equity, in 1883. That is, this bill upon which this suit was founded, whether that is not in your handwriting?

A. I don't recollect; and then I want to add that I have an impression that Mr. Putnam and I consulted in relation to that bill.

Q. Don't you remember drawing the bill?

A. No, I don't, of drawing the bill.

Q. You don't mean to say that you didn't?

A. No, it is very likely I did.

Q. I think both bills are in your handwriting.

A. If both bills are in my handwriting, I should say that I wrote them.

Q. Didn't you appear before the judiciary committee and urge the passage of the bill?

A. I have no recollection about it; I wouldn't know whether it went to the judiciary or the railroad committee. I can't say; I have no recollection about it, but it is very likely I did.

Q. If the bill should turn out to be in your handwriting, you would not have any doubt but what you did, would you?

A. No.

Q. Whether you have, for a good many years, been a sort of standing counsel for Reuben B. Dunn, Wesley Dunn and John Ayer?

144 A. No, in the way you put it; but I will answer further that I was counsel in a good many of Mr. Reuben B. Dunn's matters in his lifetime, until within a very few years before his death, and then occasionally. When he had business in this part of the State I was counsel for him.

Q. How was it about Mr. Ayer?

A. And Mr. Ayer I don't remember that I have ever been counsel for in his personal matters. I have been counsel for the Dunn Edge Tool Company, of which Mr. Ayer was president.

Q. Mr. Ayer was president of the Dunn Edge Tool Company?

A. Yes, and I have been counsel for them; he was an officer of the Dunn Edge Tool Company; and for R. W. Dunn I never was counsel except as representing his father. He sometimes came to see me, once or twice, but for his father.

Q. Now, whether you have not been counsel for a number of years, or a good many years, for Mr. Ayer in these railroad matters, the Somerset railroad matter, and the Somerset railway matter?

A. I have been counsel for the Somerset Railroad Company, and for the Somerset railway, generally through the direct engagement of Mr. Ayer, although sometimes under engagement by other parties.

Q. Well, you have been counsel for this Somerset Railway Company ever since it was supposed to have been organized, have you not?

A. No, I have not.

Q. You are counsel for them now?

A. In this case.

Q. And have appeared for them in this case?

A. Yes, sir. I haven't been counsel for the Somerset railway but very little since right away after 1883—after this reorganization. Now, wait a minute; I have been consulted by the officers a few times, but Bro. Webb has been their counsel.

Q. Mr. Webb has been their counsel, usually, right through?

A. (To Mr. Webb :) How many years?

Mr. WEBB: I guess from about '86.

WITNESS: Well, probably down to about that time. I am
145 here in Portland, and they wanted counsel nearer home. I have been occasional counsel all along down through.

Q. Practically, you were their counsel down to 1886, and Mr. Webb has been since, as you understand it?

A. Well, whatever that date may be.

Direct resumed:

Q. Touching the condition of the old road, previous to the organization of the new company in 1883, especially the suits by and against it; you may proceed and state in reference to the suits, and anything in relation to the town of Anson pertaining to any suits by or against either corporation.

A. I will precede it with a general fact or two. In 1882 there was an attempt made by the Somerset road to lease their road to the Maine Central, and they requested me, as a friend of both parties, and knowing that I was counsel for both parties, to bring the matter to the attention of the Maine Central officials. I did so, and the answer was that they could not entertain the proposition for a lease from the Somerset Railroad Company, because it would be good for nothing. "You must arrange," they said, "so as to have the consent of the bondholders." I communicated that to the officers and others of the Somerset Railroad Company, and we had a consultation as to what could be done to put the company into such shape that they could give a valid lease to the Maine Central Railroad Company. I was directed by the Somerset Railroad Company, and bondholders interested, especially Mr. Lindsey, to take such measures as I deemed would be legitimate and proper to put the road into a condition so that they could comply with the requirement of the Maine Central Railroad Company and give them a good lease. I consulted with Mr. Lindsey specifically in relation to it, as one of the trustees, and was informed by him that the trustees were indisposed to incur any liabilities in the matter. It was doubted by some whether the road was paying its running expenses, and he, as one of the trustees and speaking for the others, said they were disinclined to do anything of that kind. Thereupon I advised
146 that some creditor sue the Somerset Railroad Company and get judgment, and that the equity of redemption be sold and bid in for the benefit of the bondholders of the first bonds, as that would reduce the time for redemption from three years to one. I was directed to go ahead and do that. I commenced a suit, in favor of the Dunn Edge Tool Company, against the railroad company. I

got judgment, put the execution into the hands of the officer, had the equity of redemption seized in the execution and proposed to sell it, whereupon the Town of Anson commenced a bill in equity for an injunction.

Q. Was that same suit in the printed case, in the superior court in Kennebec county?

A. Yes. Thereupon the Town of Anson commenced proceedings for an injunction, and served the copy upon somebody, together with a notice dated February 10th, appointing Monday, the 12th of February, 1883, for a hearing on their motion for a temporary injunction, before Judge Danforth at Augusta.

Q. Who were counsel for the Town of Anson?

A. J. J. Parlin and Joseph Baker. On the copy which I have, Baker and Parlin, solicitors for complainant. We met at that time. I think representatives of the town of Norridgewock were present; I think so, but am not certain. We had no hearing, because after a general explanation by me to the counsel of the parties of the proceeding to buy in the equity of redemption for the benefit of the bondholders, it was agreed that I should suspend all proceedings and not press my suits to trial until a corporation had been formed of the bondholders, and that then the matter should be bid in in behalf of the Somerset Railway Company. There was no hearing.

(By Mr. STEWART:)

Q. You haven't given any date.

A. February 10th and 12th, 1883. Thereupon I directed the officer to stop proceedings, and he did so.

Q. To stop, or continue?

A. No; to absolutely stop his proceedings—absolutely stop. I do not think the bill in equity was entered. I had the impression that it was entered in Kennebec county, but an examination of the dockets fails to show the entry of any such bill there on
147 the docket. I telegraphed to the clerk at Skowhegan, and he telegraphed back that he can find no such entry on the docket there, and I so apprehend that that matter was dropped upon my assurances. At any rate, there was a general understanding between Mr. Parlin, the representative of the town of Anson, who appeared as attorney of record, and the representatives of Norridgewock, I think Mr. Lindsey—I don't know when Lindsey died, and I will say that when Lindsey died Mr. Harrington took his place in the negotiations—it was there arranged that at as early a date as practicable a corporation of the bondholders should be formed, and the matters drifted along until that corporation was formed. Then I put a new execution into the hands of Mr. McFadden, in 1884, and he sold the equity of redemption, as set out in the case, and it was bid in for the benefit of the Somerset railway. At the meeting of the directors when this arrangement was made Mr. Lindsey was appointed to bid in the equity of redemption in the road. He died, and thereupon I was authorized to buy it in. I was unable to be present, and I had some correspondence with Mr. Harrington in relation to the matter and I

think he acted and bid it in. I don't remember absolutely about that, but I simply asked him to do it, and I have his letter saying that he would do it.

(By Mr. STEWART:)

Q. The records show that it was bid in by the Somerset railway?

A. I mean that the man who did it did it for them, as the agent and bidder. It was bid in for the Somerset railway, and conveyed to them. After the papers were made up, then I had some negotiations with Mr. Parlin in relation to the disposition of the cases. We had a good many conversations about it. He thought we ought to pay the costs and fees of counsel, etc., on the other side of these cases, and the matter was discussed a good many times between him and me. Finally it was agreed conditionally that if they would pay him \$100 in full of all these expenses, he would withdraw in behalf of his clients whom he represented; he said Mr. Brown and the Inhabitants of Anson would withdraw all opposition to our decree of foreclosure, withdraw all attempts
148 to set aside the judgment in the Dunn Edge Tool Company case, and enter the cases pending in the Somerset county, neither party. I don't know, of my own knowledge, I never saw the docket, but it was understood that Mr. Brown and the inhabitants of Anson had both commenced suits against the Somerset railway. The matter stood in that way, and finally I received this letter from Mr. Parlin. It is dated January 10th, 1884, but I know it could not have been as early as that, and my filing of it is "Parlin, January, 1885," Somerset Railroad cases. I think he made a mistake early in the year. The letter is as follows:

"J. JUSTIN PARLIN, COUNSELLOR-AT-LAW.

NO. ANSON, ME., *Jan'y* 10, 1884.

Hon. J. H. Drummond.

DEAR SIR: When at Augusta you remember that you were to see Mr. Ayer and advise the payment of certain amount of costs in the Somerset R. R. suits. I attended the bondholders' meeting at the time and expected to meet you then, but as you was absent I did not mention the matter to any one.

What conclusion have you come to in the case. I do not wish to hinder or throw any obstacles in the way of what is best for all, but I do feel that I ought to have at least one hundred dollars costs. Let me know at once as our court adjourns next week and I want to know what to do with the cases here.

Yours, &c.,

J. J. PARLIN.

(In margin :) Write me at Hotel Heselton, Skowhegan."

I advised the payment of the \$100 costs, and I am very sure the money to pay it passed through my hands, but of that I cannot swear absolutely. But at any rate, Parlin was satisfied, and decree was entered in the foreclosure suit and their proceedings in

Kennebec dropped. My understanding was that the cases at Skowhegan should be entered neither party.

(By Judge SYMONDS :)

Q. You mean the cases against the Somerset railroad?

149 A. Yes; that the cases at Skowhegan against the Somerset railroad should be entered neither party, although I think they had previously been defaulted, although I cannot say what was actually done. I have the impression, and a pretty strong one, if you will allow me to go back, that he consented to that decree of foreclosure on condition that his costs should be paid, and that when the preliminary decree was entered it was entered reserving the right to him to move to open the case. You remember the decree, and I think that was done so, if the costs were not paid, to give him a chance, if he desired, to withdraw from the agreement; but he did not withdraw, and the subsequent proceedings are as appears of record.

Q. Did he receive his \$100?

A. I am very certain the money passed through my hands, but I cannot swear absolutely. At any rate, he was satisfied. I always understood he received the money, and he was satisfied to carry out the agreement as we arranged it.

A. R. SMALL, having been duly sworn for the plaintiff, testified:

Direct examination by E. F. WEBB, Esq.:

Q. In your testimony given in the other printed case you stated that you had been treasurer of the Somerset Railroad Company from 1878. Do you wish to correct that statement?

A. I do.

Q. From what time have you been treasurer?

A. From January, 1874, until 1884, at the time of the foreclosure, and I have been treasurer of the Somerset railway from its organization until the present time.

Q. As treasurer, did you have the custody of the books of the Somerset Railroad Company?

A. I did.

Q. Do you know whether the \$450,000 bonds that were issued by the Somerset Railroad Company and secured by the mortgage of 1871 were disposed of *bona fide* to actual holders for value?

150 A. I can say that I have actual knowledge of the disposition of quite a lot of them; but those that came into my immediate possession, for which I was accountable, were \$235,000 in bonds and receipts for bonds placed as collateral \$76,200, making \$311,200. That is the receipts for bonds that were placed as collateral; the receipts were placed in my hands, and they went on the books. Those added to the \$235,000 bonds, made \$311,200 for which I became responsible.

Q. Do you know whether the whole \$450,000 had been disposed of before the first of July, 1876?

A. I think they were.

Q. Now, in relation to the price for which the bonds were sold. Are you able to state the price for the sale of the bonds?

A. (Referring to memoranda.) Of the \$311,200 I disposed of \$126,800 at ninety cents.

Q. Whether or not that was by vote of the directors?

A. It was by vote of the directors—by vote of the directors, and is so recorded.

Q. In the directors' record. State as to the disposition of the rest—the price.

A. \$106,300 were disposed of at par.

Q. State as to the rest.

A. \$78,100 were sold at auction.

Q. Do you know the time that they were sold at auction?

A. I have the sale here. December 19, 1882.

Q. Do you remember the price that they brought at auction?

A. Thirty-five cents.

Q. State the history of those bonds—who held them as collateral, and the date on which they were sold.

A. \$45,000 were held as collateral on a note given to the Dunn Edge Tool Company for \$29,250.

Q. Were those sold for the price that you have just stated?

A. They were sold for thirty-five cents.

Q. To whom were they sold?

A. Sold at auction.

Q. Do you know who the purchaser was?

A. I wasn't present at the sale.

151 Q. Were those bonds held as collateral?

A. Those bonds were held as collateral—\$45,000 of them.

Q. Were the bonds sold by the party holding them as collateral security?

A. I so understood it at the time.

(By Mr. STEWARD:)

Q. State to whom the bonds were sold, if you know.

A. I have not any positive knowledge.

Q. Only by hearsay?

A. Only by hearsay; I wasn't present.

Q. Subtracting the \$45,000 from the \$78,100, you may state in relation to the balance.

A. Of the balance, \$28,000 were held as collateral in Portland.

Q. By whom?

A. The Portland rolling mills.

Q. Whose note did the Portland rolling mills hold?

A. It was the note of the Somerset Railroad Company.

Q. The note of the Somerset Railroad Company given to the Portland rolling mills. Do you know what the note was given for?

A. For iron; rails.

Q. And the \$28,000 of bonds of the Somerset Railroad Company were delivered to the Portland rolling mills as security for the note as collateral?

A. They were; yes.

Q. The bonds so held as collateral were sold at auction by the rolling mills?

A. They were so included in the sale.

(By Judge SYMONDS:)

Q. In the auction sale?

A. In the auction sale; yes.

Q. Do you know where the bonds were sold, whether at Portland or Oakland?

A. I know from the record sent me. They were sold at the Waterville savings bank, in Waterville.

Q. Do you know the price they brought?

A. Thirty-five cents.

(By Mr. STEWART:)

Q. Who bought them?

152 A. I cannot tell who bid them in.

Q. Whether or not \$19,000 of the bonds were sold under the direction of the financial committee?

A. They were.

Q. \$19,000 of the bonds you have described?

A. I haven't described all of those bonds. Five thousand one hundred were pledged as collateral on the Dunn Edge Tool Company note, and were sold at auction.

Q. Sold by the person holding them as collateral to enforce the payment of the note?

A. I so understand it.

Q. Do you know the price they brought?

A. Thirty-five cents.

Q. Do you know the time that that sale was made?

A. December 19, 1882.

Q. Were there any other bonds included in that sale?

A. There were not.

Q. Can you state the total amount of these bonds that were put up as collateral?

A. I cannot from memory; no, sir. If I recollect, there was \$29,250 of the Dunn Edge Tool Company. There were two notes, one of the Dunn Edge Tool Company for \$3,300, and the other was given to the Portland rolling mills.

Q. About how much was that note?

A. To secure treasurer's note for \$8,952.07, and one treasurer's note for \$18,527.71.

Q. When were those notes dated?

A. The first note was June 27, 1874.

Q. On what time?

A. My memorandum does not state.

Q. When was the second note?

A. November 16, 1874.

Q. Do you know what time that was given on?

A. I do not.

Q. What was the amount of bonds put up as collateral to those two notes?

153 A. At first \$38,000. They returned to me \$10,000, so that left \$28,000, the number sold at auction.

Q. Those were sold by the rolling mill in payment of the collateral note?

A. I can't state whether they sold them or not.

Q. Were there \$19,000 of the bonds that you have described sold in any different manner? Were \$19,000 sold at ninety cents?

A. Not of the bonds that came into my hands; no, sir.

Q. With the exception of the bonds that you have just described, were all the other bonds that came into your hands sold at par, for cash or its equivalent?

A. They were. I so stated. That is, \$106,300 were sold at par, for which I received cash or its equivalent.

Q. In reference to the appointment of the committee of the stockholders of the Somerset Railroad Company, made to examine into the financial condition of the company, as to which Mr. Drummond has testified today, and of which S. D. Lindsey was a member, do you remember whether any member of that committee came to your office as treasurer of the company, to examine the company's books and accounts and obtain its financial standing?

A. I do, distinctly. It was S. D. Lindsey.

Q. State what he did?

A. He examined the stock book and the record of the bonds, and I may say that he went through the accounts as thoroughly as he could in the time that he spent there.

Q. Did you give him the liabilities of the company?

A. I did; yes, sir.

Q. And the assets?

A. The assets and liabilities. I gave him the liabilities, the outstanding debt, including the coupon interest as near as I was able to.

Q. As clerk of the corporation, and as treasurer, you have the custody of the books and papers relating to the company?

A. I do.

154 Q. I show you what purports to be the proxy of S. S. Thompson to J. H. Drummond, dated August 11, 1883, with the vote annexed to it containing a list of the names of R. B. Dunn and others for directors, and on the back of it signed S. S. Thompson, by J. H. Drummond, proxy, 288 votes. Whether or not that proxy and the vote which is pinned to the proxy, came into your custody and possession as clerk of the company from your predecessor?

A. They did.

Q. I show you another vote, containing on one side the names of the same persons, namely, R. B. Dunn and others, for directors, and on the back of it the following: "Town of Anson, \$27,500 bonds, by Edwin Collins," and ask you whether or not that vote came into your possession as clerk of this corporation in the same manner that you have stated the Thompson vote came into your possession.

A. It did.

Q. Do you know the time when the Somerset railway took possession of the old Somerset railroad?

A. September 1st, 1883.

Q. And it has been running it since?

A. Been running it since; yes, sir.

Q. Will you state when the last coupons upon the bonds issued by the Somerset Railroad Company, of 1871, were paid?

A. In July, 1878.

Q. No coupons have been paid upon them since?

A. No.

(By Mr. STEWART:)

Q. You mean upon none of the bonds; nothing since 1878?

A. Nothing has been paid since.

Q. Will you find the record of the stockholders' meeting of August, 1887. Whether or not there was a vote at that time by the stockholders, voting yes and no, upon the question of authorizing a mortgage to secure the payment of the \$225,000 bonds?

A. There was such a vote, and so recorded.

Q. Did S. S. Thompson vote upon that question?

A. Voted by proxy; yes, sir.

155 Q. Who cast his vote?

A. G. T. Stevens.

Q. How many shares did he vote?

A. Two hundred and eighty-eight.

Q. How was it with the town of Anson at the same time, on the same question?

A. They cast a vote in the negative of two hundred and seventy-five shares.

Q. Whether or not Mr. Thompson was then a stockholder of the Somerset railway? That is, had he surrendered his bonds and taken out shares of stock?

A. He had not.

Q. Will you explain about the vote which he cast with the 288 shares? How happened he to cast that vote if he was not a stockholder—if he had not surrendered his bonds and taken his stock?

A. I can't explain his action in the matter.

Q. Why did you permit him to vote?

A. Because I had advice from Mr. Drummond so to do.

Q. What did he vote, bonds?

A. He voted bonds.

Q. Do you know whether they were the same bonds he had used in the meeting four years before for the organization of the new corporation, the Somerset railway?

A. I have no knowledge of it.

Q. Did the town of Anson have stock at that time, or did they vote their bonds?

A. They voted on their bonds.

Q. Did you permit them to vote for the same reason that you have stated that you permitted Mr. Thompson's bonds to vote?

A. I did.

Q. I will ask you what the opinion delivered to you by Mr. Drummond was as to their right to vote on their bonds, without having surrendered them to the company and taken out stock?

A. It would be impossible for me to recall the exact language.

Q. You need not; state the substance?

156 A. The substance was that he thought it would be both unfair and unwise to object. That was the substance.

Q. Was it on that ground that you permitted them to vote?

A. It was.

Q. Can you state how many bonds were present at the first meeting of the bondholders held to organize the new corporation?

A. Only from the records.

Q. Did you, yourself, present any bonds?

A. Not for record.

Q. Did you have any bonds there?

A. I did.

Q. How many did you have there?

A. All that were owned and held by the Dunn Edge Tool Company.

Q. About how many?

A. I should have to refer to the record to tell.

Q. All of the \$200,000?

A. All those represented here.

Q. Do you mean that you took them in the hall where the meeting was held?

A. I mean I went to the treasurer of the bank, and asked for them and took them to the hall and gave them to Mr. Ayer, the president?

Q. Do you know whether the town of Anson was represented at that meeting by its selectmen, or by anybody and, if so, by whom?

A. My recollection is now that the town of Anson was represented by two of the selectmen—Edwin Collins and Pease.

Q. Do you know whether they had the bonds of the town there at the meeting?

A. I could not answer positively.

Q. Have you the paper called the Union Advocate, published at North Anson, Me., containing the notice which was published for calling the meeting of the bondholders?

A. I have (producing papers). Those are the papers.

Q. Will you state the date of the papers in which the notice was published?

157 A. August 1st, 8th and 15th, 1883.

Q. Do you know whether there was any other paper published in the town of Anson, or at the village of North Anson, at that time?

A. I do not; I think not.

Q. Whether the same notice, the call for the meeting of the bondholders to organize a new company, was published in a paper called the Waterville Sentinel at Waterville, Me.?

A. It was.

Q. Will you state the dates of the paper in which the call was published?

A. July 20th, July 27th and August 3d, 1883.

Q. Have you those papers with you?

A. Yes (producing papers). These are the papers.

Q. Whether the new corporation, the Somerset railway, issued bonds to the amount of \$225,000?

A. It did.

Q. At what price were those bonds sold?

A. I think ninety cents.

Q. Were the proceeds cash?

A. The proceeds were cash.

Q. Did the cash go into the treasury of the company?

A. The cash went into the treasury of the company.

Q. You may state to whom the \$225,000 in bonds were sold?

A. Adams, Blodget & Co., Boston, took \$100,000 of them, and the other \$125,000 went to the New England Mutual Life Insurance Company of Boston.

(By Mr. STEWART:)

Q. So they were all sold in Boston?

A. They were all sold in Boston.

Q. Can you state what became of the proceeds of the \$225 of bonds—what application was made of that money?

A. It was applied to the extension of the Somerset railway from North Anson to Bingham.

Q. What is the distance from North Anson to Bingham?

A. Sixteen miles.

Q. Is that now a part of the Somerset system?

A. It is.

158 Q. Did the mortgage issued by the company to Bodwell and others, trustees, cover the entire length of the road, from Oakland to Bingham?

A. It did.

Q. What is the entire length of the road?

A. To be exact it is $41\frac{6}{10}$ miles.

Q. Whether any part of the proceeds of the \$225 in bonds was used in building an extension of the road from its main line to the Dodlin granite quarry?

A. Well, that would be pretty difficult for me to say.

Q. The iron was bought of the Maine Central, was it not?

A. The iron was bought of the Maine Central.

Q. And ultimately was it paid for from the proceeds of these bonds?

A. I couldn't say that it was.

Q. It is stated in the bill, which was drawn in February, 1893, that the current liabilities of the company were \$65,000. Is that correct?

A. I can verify it by a report which I have here, if necessary.

Q. Whether it is practically correct?

A. I should say it was approximately correct.

Q. I will ask you whether the Somerset Railroad Company, just preceding the organization of the Somerset railway, was insolvent, whether it was able to meet its liabilities?

A. Well, I should say it was insolvent, beyond a doubt.

Cross-examination by D. D. STEWART, Esq.:

Q. State definitely when you became treasurer.

A. I began in 1874.

Q. Who was treasurer before you?

A. George A. Fletcher.

Q. State precisely how many bonds came into your hands as treasurer, in 1874.

A. \$235,000. January 20th, 1875, was when I received them.

Q. You never had had any before?

A. No, sir. \$76,200 I received on receipts.

159 Q. You received receipts from—

A. From Mr. Ayer, the president. They were placed by him as collateral, and he turned the receipts over to me as treasurer.

Q. You received the receipts from Mr. Ayer?

A. The receipts covered a portion, but I received his memorandum for bonds placed as collateral with receipts from the parties amounting to \$76,200.

Q. Do I understand you that you received receipts from Mr. Ayer for \$76,200 and that those receipts were signed by the parties who held them as collateral? Is that what you mean?

A. That is what I mean, precisely. I can't say he produced a receipt for every one of them, but he gave me a memorandum which I accepted.

Q. Now give me the names of the parties who signed the receipts?

A. I doubt if I can do it. I will give them so far as I am able.

Q. You had those receipts, did you?

A. Yes. Edward Rowe, \$14,400; M. M. Thompson, for \$500; George A. Fletcher, treasurer, \$1,000 in bonds; Samuel Bunker, \$1,600; William H. Brown, \$3,000; Samuel E. May, \$5,000; S. B. Cragin, \$900; C. R. Vaughn, \$100; William Atkinson, \$1,000; Nathan Weston, \$600; Thomas H. Weston, \$100; George H. Smith, \$100; Henry Wing, \$100; West Waterville savings bank, \$2,300; the Waterville savings bank, \$5,500; Portland rolling mill, \$38,000. I think you have them all.

Q. Those were the receipts which Mr. Ayer handed you?

A. Yes, sir.

Q. Have you any personal knowledge of what was done with the balance of the \$450,000 of bonds?

A. Yes; I have.

Q. State what was done with them.

A. You mean outside of these \$311,000?

Q. Yes; 235,000.

A. Added to \$76,000 it makes \$311,200. The balance of them

160 were disposed of by Mr. Ayer as president, but many of them passed through my hands as his clerk or secretary—that is, in another capacity than as treasurer.

Q. You say that Mr. Ayer disposed of all the balance of \$450,000 of bonds?

A. He did.

Judge SYMONDS: You mean the balance above the \$311,000, do you not?

Mr. STEWART: Yes; that is what I understand.

Q. You say they passed through your hands as his clerk? Is that what you mean?

A. Not all of them; a portion of them.

Q. I don't know as I understand what you mean. I understood you to say at first that you knew what became of the whole of the balance, and that they passed through your hands as clerk. Now, you say that a portion of them did?

A. I didn't intend to say they all did; a portion.

Q. You said they passed through your hands as clerk.

A. I said a portion of them.

Q. Now, what do you mean by a portion of them?

A. I can't tell from memory.

Q. Can you tell from any knowledge that you have how many bonds passed through your hands?

A. No, sir; I can't. As clerk for the Dunn Edge Tool Company, or for Mr. Ayer as treasurer, I kept his account, and in that way I had knowledge of these bonds, that is a portion of them, of the disposition of them, and I had the filing of the vouchers and the numbering of them.

Q. You say portion of these bonds passed through your hands as Mr. Ayer's clerk. Now, haven't you some idea how much that was?

A. No, sir; I haven't.

Q. Can't fix any amount, either way?

A. No, sir.

Q. Neither as to what passed through your hands or what did not?

A. I couldn't.

161 Q. How many bonds, if any, did you receive from the former treasurer, George A. Fletcher?

A. None.

Q. Have you any knowledge that a portion of these bonds, something like \$100,000, or some of them, were obtained from him, or from his widow after his death?

A. No knowledge whatever.

Q. Have you any knowledge that anybody went there to Mr. Fletcher's and got any bonds that were found in his possession after his death?

A. No sir, I never heard of it.

Q. If anybody did get any such bonds, they were never delivered to you?

A. No sir. All the bonds I ever received came directly from Mr. Ayer, president. I will qualify that by saying that in addition to those, some were returned to me and subsequently sold or disposed of. That is, the \$10,000 from the Portland rolling mill.

Q. That is included in the receipt?

A. Yes, that is included in the receipts.

Q. Nothing outside of what you have stated?

A. Nothing outside of it.

Q. Do you know how many of these bonds outside of the \$311,000 were in Mr. Ayer's possession, or came into his possession? You say you have some personal knowledge, and I understood you to have a good deal more than you appear to have. I want to know a little further about it. Do you know how many of these bonds were in Mr. Ayer's possession before you became treasurer?

A. I could not state the amount, no sir.

Q. In what capacity did Mr. Ayer act in holding these bonds before you became treasurer?

A. As president of the Somerset Railroad Company, and perhaps I might add, chairman of the finance committee.

Q. These bonds, whenever you saw any of them, were all signed and executed by the officers of the company? You don't mean by this any blank bonds?

162 A. I don't think there were any blank bonds. I think they were all signed by the officers.

Q. All the bonds that you saw were signed?

A. By the officers of the road.

Q. And regularly executed?

A. What do you mean by that?

Q. I mean signed by the officers of the company, under the by-laws. There was a by-law requiring certain ones to sign, I think the president and treasurer.

A. They were signed by the president and treasurer, I am quite sure.

Q. So that, if I say the bonds were all signed by the proper officers, that you are pretty sure of?

A. I am pretty sure of it, I wouldn't say positively.

Q. What, if anything, do you know about the payment of any coupons before you became treasurer. I want to see what you know before you became treasurer; I want to see what you know both ways. You became treasurer in January, 1874?

A. In 1874. Well, I know from being Mr. Ayer's clerk and filing the vouchers, in no other way.

Q. Now, tell us what you know about it?

A. I have told you all I know.

Q. You haven't said that you know anything about the payment of any coupons before that time?

A. I know it. I say the only knowledge I have is from filing the vouchers; that is, the coupons that were paid and filed away as vouchers, they passed through my hands a portion of them.

Q. Have you any knowledge as to whom those coupons were paid to?

A. Only from the account that I made up.

Q. What do you know about coupons, before 1874, having been paid to Dunn and the Dunn Edge Tool Company on bonds which they held?

A. Before when, before 1874?

Q. Yes.

A. I have no recollection that any were paid to the Dunn Edge Tool Company.

163 Q. Were not you connected with the Dunn Edge Tool Company?

A. I was.

Q. State in what way.

A. I was their book-keeper.

Q. Their book-keeper from what time to what time?

A. I have been book-keeper for the Dunn Edge Tool Company from 1868 up to the present time.

Q. You say book-keeper?

A. Yes sir, book-keeper and accountant, in their office.

Q. And have been in their employ during all that time?

A. I have, yes sir.

Q. Then you ought to know whether they received any money on their coupons, hadn't you?

A. That is some time ago, I can't recollect.

Q. If they received any money on their coupons, would that necessarily go through your hands?

A. Yes sir. I kept the cash book.

Q. Did you have their bonds in your custody?

A. Yes sir.

Q. About how many bonds did the Dunn Edge Tool Company have, I will say in 1874, when you became treasurer of the road?

A. I have no knowledge of any in 1874. I have no knowledge that the Dunn Edge Tool Company held any bonds of the Somerset railroad in 1874.

Q. Then what is the first knowledge that you have of their having any bonds in that company, and how many of them?

A. The first bonds they received came from me, \$126,800.

Q. When was that?

A. January 1, 1875.

Q. Did these make a part of the \$235,000 that you have spoken of?

A. They did, yes sir.

Q. You delivered those to the Dunn Edge Tool Company, as treasurer, did you?

A. I did.

164 Q. By whose order?

A. By order of the directors of the Somerset railroad, as per record of November 18, 1875.

Q. Now state the circumstances. Did the Dunn Edge Tool Company pay for those? If so, in what way and how much?

A. They advanced the cash for them—had advanced the cash or its equivalent.

Q. How much cash did they advance?

A. They advanced cash for the full amount, less ten per cent., about \$114,120.

(By Mr. WEBB:)

Q. The sale was made at ninety?

A. The sale was made at ninety. The indebtedness to the Dunn Edge Tool Company, as made up, was \$117,064.97. The Dunn Edge Tool Company brought in a bill of items for cash paid out on account of the Somerset railroad, the balance amounting, on January 1, 1875, to \$117,064.97. They paid that in \$126,800 in bonds at ninety cents.

Q. How did they pay the balance?

A. The accrued interest on the bonds, amounting to \$2,931.84, and cash, \$13.13, balanced it. On these bonds there was accrued interest amounting to \$2,931.84.

Q. Do you mean that the accrued interest was added to the bonds?

A. I mean it was charged to the Dunn Edge Tool Company, and they paid it the same as they would pay anything.

Q. If they paid, for the bonds at ninety cents on the dollar, that would be \$114,120.00?

A. Yes; that is right, and there was \$13.13 cash.

(By Mr. DRUMMOND:)

Q. What was the interest allowed?

A. \$2,931.84.

Q. I don't understand you to say that you have much personal knowledge of the disposition of any of these bonds until you became treasurer. You left the impression on my mind, when I asked you if you had any personal knowledge of the balance of those \$450,000 above the \$311,000—the first statement of yours would leave the impression that you knew all about it.

165 Mr. DRUMMOND: You asked if he had any personal knowledge, and he said he had.

Mr. STEWART: Now, then, he says they passed through his hands

A. A portion of them did.

Q. Have you any more knowledge of the balance of the \$450,000 than what you have stated?

A. Not outside of those that came into my hands, I have not.

Q. Did any more come into your hands, except through these receipts?

A. No, sir.

Q. If I say that you have no other knowledge than what you have stated about the balance of the \$450,000, I don't see why that doesn't cover it?

A. I tell you I had a knowledge of a portion of them. I can tell about \$31,000.

Q. You can state about \$31,000; well?

A. Those went into Joel Gray's hands.

Q. There were \$31,000 in Joel Gray's hands before January, 1874?

A. Yes.

Q. And you have no knowledge of the balance of the \$450,000 above the \$311,000, except what you have already stated?

A. No sir.

Q. Now, what, if anything, do you know about the payment of any coupons since 1874, and upon whose bonds?

A. I think I can tell you if you will allow me to refresh my memory from my memorandum. Tell me just what you want to know.

Q. I want to know just whom you paid interest to since you became treasurer in 1874? I want to know who has had it, and how much. That is just what I want to get at?

A. Do you want the names of the parties?

Q. Yes, and the amounts and dates.

A. 1874, M. M. Thompson, \$21. The next one, two, three, four items are cash. They don't state whom; I can't tell who; 166 but I can give you the amounts. They are small amounts.

Why I call them cash, the parties would pay their freight bills in coupons and as treasurer I received them.

Q. How much do you say that was?

A. \$42 and \$21.

Q. Do you mean to put them all into the same category?

A. I can give you them together; I can add them up.

Q. \$42; what was that for?

A. Cash; I can't say who it was; I don't know who.

Q. You paid Thompson \$21?

A. Yes.

Q. You paid \$42 together; you say you can't remember to whom?

Mr. DRUMMOND: He has got four items, what is the other one?

A. \$21, \$3.50, \$38.50. There are more the same year. \$3.50 more, \$28, \$3.50, M. M. Thompson, \$10.50, M. M. Thompson, \$3.50. The Dunn Edge Tool Company—that is 1875.

Q. That is all in 1874?

A. That is all.

Q. The Dunn Edge Tool Company how much?

A. \$6,500.00, R. B. Dunn, \$686.00. There are other items here, four cash items now; will you have them separate?

Q. Yes, the same as you did before.

A. \$10.50, \$3.50, \$175, \$3.50; Luce & Moore, \$35.00. That was in 1876.

Q. Was this of Luce & Moore in 1876?

A. Luce & Moore was for coupons in 1876, \$35.00.

Q. Is that all in 1875?

A. That is all in 1875.

Q. Now 1876?

A. Luce & Moore was in 1876, and that is only one.

Mr. DRUMMOND: There is one which he does not know whether it is in 1876 or 1877.

WITNESS: It is both; \$110.00 for freight bills; they paid freight accounts.

Q. There is nothing more in 1877?

167 A. That is all.

Q. Now 1878?

A. 1878, Joel Gray's estate, \$598.50, \$3,507.63.

Q. Joel Gray?

A. Joel Gray's estate.

Q. Were these all coupons?

A. All coupons; now \$230.00, the same estate; M. M. Thompson, \$28.00. That is all.

Q. That is all in 1878?

A. That is all in 1878, and that is all I paid.

(By Mr. DRUMMOND:)

Q. Have you paid any since?

A. No sir.

Q. Do you say there was nothing more in 1879?

A. Nothing at all in 1879.

Q. When was this \$28.00 of Thompson's paid?

A. The coupons were in 1877 and 1878, but I paid them in 1878.

Q. Thompson \$28.00; that you say was in 1878?

A. 1878.

Q. Then in 1879 you say you paid nothing?

A. Nothing.

Q. Will you state what business connection with the Dunn Edge Tool Company Mr. Ayer has held during these years?

A. He is treasurer.

Q. Ever since when?

A. I don't know.

Q. You mean since 1868 then?

A. He can answer that question for himself, I can't; I don't know sir.

Q. Was he in their employ in 1868?

A. Yes sir.

Q. If I should say that he had been treasurer of the company since 1868, and how much before you don't know, that would be correct?

A. That is correct, yes sir.

Q. Has he been one of the managing men in the Dunn Edge Tool Company as well as treasurer?

168 A. Well I should say so, yes sir.

Q. Do you know whether he is a member of that company or not?

A. He is.

Q. Then if you add to one of the managing men of the company that he is a member of it, that covers it substantially, does it?

A. Yes sir.

Q. Who has been clerk of this Somerset Railroad Company?

A. The Somerset Railroad Company? Edward Rowe and myself.

Q. When did you become clerk?

A. I have forgotten. I think in January, 1878. I can tell from the records of the railroad company—I never was clerk of the railroad company at all.

Q. Do you mean that you have been clerk of the Dunn Edge Tool Company?

A. Of the Somerset railway.

Q. I understood you to say that from 1874 down to the organization of the new company, you were treasurer of the old company, and have been treasurer since of the new company?

A. Yes sir.

Q. I really meant to inquire who the clerk of the Somerset Railroad Company was.

A. Edward Rowe, I think the first clerk was.

Q. You never have been clerk of that company?

A. No sir.

Q. You have been treasurer of it?

A. I am.

Q. Are you the same A. R. Small upon whom this bill in equity was served?

A. I am.

Q. The bill in equity to foreclose the old mortgage?

A. Yes sir.

Q. Let us see if I have this right. "I have said, I am the same

169 A. R. Small upon whom the bill in equity was served in 1883 to foreclose the mortgage of July 1st, 1871." You understood me to mean that?

A. That is what I understood it.

Q. Have you any knowledge of a meeting of the directors, or a vote of the directors, to withdraw any defense to the suit of the Dunn Edge Tool Company, to withdraw any defense to that bill in equity? I understand that there is a vote upon your records somewhere to withdraw and make no further objection to the foreclosure of the bill in equity.

A. I don't know; I have no recollection of it.

Direct resumed:

Q. I have inquired of you in relation to the votes in your custody as clerk of the Somerset railway at a meeting of the stockholders held in August, 1887. Whether at the meeting of the stockholders of the Somerset railway held at Oakland in the summer of 1887, a vote was taken by the stockholders as to whether the Somerset railway would issue a mortgage to secure the payment of its bonds, \$225,000, the stockholders voting yes and no? You have the votes purporting to have been cast by the several stockholders at that meeting?

A. I have.

Q. Whether there was a vote of William H. Brown, on forty-one shares, cast at that meeting?

A. I have the vote. This is the vote, which I hand to the stenographer.

“W. H. Brown.

No. —.

\$4,100.”

Q. Do you know whether that is the William H. Brown of the firm of Brown & Hilton, of North Anson?

A. The same man.

Q. Was this William H. Brown a director of the new company, and also a director of the old company?

A. He was.

170 Cross resumed:

Q. Whether you were requested, as treasurer, to pay the bonds which are owned by the petitioners and which became due on July 1st, 1891? You will remember that I wrote you?

A. I had a letter from you, and replied to it.

Q. Requesting you to pay all those bonds that the petitioners owned at that time?

A. I don't remember the contents of your letter, but it had some reference to the bonds and coupons.

Q. Was it not a request for the payment of the bonds?

A. I can't say that it was.

Q. You have got the letter?

A. I have.

(By Mr. WEBB:)

Q. The letter is at Oakland?

A. At Oakland, yes sir.

It is admitted that Mr. Stewart, in behalf of the petitioners, wrote to Mr. Small, requesting payment of the bonds, and that payment was denied. Copies of said letters are put in and marked exhibits.

Q. You were the last elected treasurer of the Somerset Railroad Company, being elected on June 11, 1884?

A. Yes.

Q. Whether you have applied any of the income of the road to the payment of the first-mortgage bonds, or the coupons, secured under the mortgage of July 1st, 1871, since the trustees were appointed by the court under the Anson petition?

A. No sir.

Q. What amount of cash have you received, in your capacity as treasurer of the Somerset railway, since the appointment of those trustees in October, 1892?

A. I could not answer without the cash book. I will answer by referring to the reports of the company.

Q. Here is the last one, which will enable you to answer this last question. My inquiry is, What is the whole amount of money that you have received as treasurer, for the year 1893, for instance?

A. Do you want it for the year ending June 30th, 1893?

171 Q. Yes, to take your report, the whole amount of gross receipts and net income?

A. The gross receipts for the year ending June 30th, 1893, \$92,250.42. Net receipts, \$16,426.36.

Q. The net is thirty-two thousand?

A. I can give it in detail then, \$32,144.10.

Q. Now, won't you state how you applied that \$32,000?

A. Interest on the funded debt, \$11,250.

Q. Interest on what, the new mortgage bonds for \$225,000?

A. Yes, sir.

Q. You mean you are paying interest on the whole \$225,000?

A. Yes, sir; that is what I mean.

Q. How much do you make that?

A. \$11,250. Interest on floating debt, \$4,050.65; construction of telegraph line, \$417.12. That leaves a net income of \$16,426.36.

Q. We have got the net income already.

A. I want to show the disposition of this \$16,426.36. It is not shown here, but it is shown on the books. It should have appeared here; it is an omission. I reduced the floating debt about \$9,000. I can't give you the exact figures.

Q. You say the balance of \$16,000 was used to reduce the floating debt and something else?

A. And payment for new rolling stock and a claim for land damage. There are a few other items that I cannot recall, and the balance is cash on hand. In the original copy of the report, as made up by the accountant, the disposition of this \$16,426.36 was stated in detail. When the proof came back from the printer it was not referred to me; I did not see it, and the disposition of the \$16,426.36 was omitted in printing by mistake. I did not know of it until after the report had been issued.

Q. I would like to have you state the date or dates, when you paid this interest on these new bonds. Did any become due in January?

A. Yes, sir.

Q. And the first of July?

172 A. And the first of July. They came due the first of January and the first of July.

Q. And you paid the interest upon those dates?

A. Yes, sir.

Q. The first day of January and the first day of July?

A. The funds were in the bank to pay with the first day, and I paid the interest on the bonds on those days—the funds were appropriated for the payment of the coupons falling due January 1st, and July 1st, the month preceding. The payments were made on January 1st, 1893 and on July 1st, 1893.

Q. State in this connection what that money is made up out of and how it comes into your hands, and whom it comes from—whether it does not come from passengers and freight.

A. Do you want it in detail?

A. No, only a general statement.

A. It comes from freight, passengers and express earnings, mail earnings and other sources.

Q. Who makes those payments to you?

A. The earnings of the road are made by the station agents.

Q. Payments made to you directly by the station agents?

A. Yes, sir.

Q. From each station?

A. From each station.

Q. Whether all of the station agents, as they are named in our writ of entry, make these payments to you?

A. They do.

Q. And I suppose you give them receipts always, for them?

A. Always.

Q. Now my inquiry is whether you have made all these payments that you have spoken of, the payments of the interest on the new bonds and the payments on all these other matters mentioned by you under the instructions and directions of Mr. John Ayer?

A. Yes, under his directions, and by authority of my powers as treasurer.

Q. What was the gross receipts and income of the road last year, the year previous to this?

173 A. I shall have to refer to the report.

Q. The gross receipts and income as shown by your report for the year previously. I want you to state the amounts for the several years, if you will, and I want to see, in addition, if you have applied the money to the payment of these new bonds.

A. I have paid the interest on them. I will state, in a general way, that I have paid the interest on them.

Q. (Showing witness a paper). Take the report for 1892 and give the gross receipts and the net income, and then I only want to inquire further as to the payment of interest on these bonds. The rest will take care of itself, I suppose?

A. The gross receipts for 1892 were \$80,207.77; the net receipts, \$25,479.73.

Q. Whether you applied out of those net proceeds enough to pay the interest on these \$225,000 of bonds.

A. Yes, sir.

(By Mr. WEBB:)

Q. There are only five items; state how you applied the balance.

A. Interest on floating debt, \$5,579.09; land damage, \$776.50; construction settlements, \$4,235.80; sundry accounts, \$2,371.20.

Q. Now, will you take 1891 (showing witness a paper)?

A. Gross receipts, \$72,273.28; net receipts, \$26,220.93.

Q. Whether of that you have applied enough to cover the interest on these new mortgage bonds.

A. I did.

(By Mr. WEBB:)

Q. State how you applied the rest.

A. I cannot state, without the book, how it was applied.

(By SAME:)

Q. State in general terms how you applied the rest.

A. To construction account and equipment, as shown by the equipment account, in a general way.

(By Judge SYMONDS:)

Q. Construction, equipment and expenses of operation?

A. No, the operation is all shown. The construction and equipment; that is, rolling stock.

Q. (Showing report.) Now take 1890.

A. Gross receipts, \$54,189.15; net receipts, \$17,793.94.

174 Q. Did you pay the interest on the bonds?

A. Yes, sir.

Q. And the rest of it?

A. It was expended in the general way, on the construction account. I say construction account, because everything finally goes to that, it is for the betterment of the road.

Q. Now, the gross and net receipts for 1889?

A. Gross, \$41,609.16; net, \$8,345.

Q. Did you pay the interest on those bonds that year?

A. Six months' interest, \$6,250.05.

Q. That was the first interest that became due?

A. That was the first.

Q. The bonds were issued when?

A. 1887. I wouldn't be positive; my other report preceding this will show whether there was any interest paid or not. The balance went for the betterments of the road.

Q. What do you say about 1888? What were the gross and the net receipts?

A. Gross receipts, \$37,391.91; net, \$12,277.95. That was applied to the betterments of the road.

Q. How much of that was used to pay the interest upon these bonds?

A. None.

Q. There was not any?

A. No, sir.

Q. In general terms, you have applied enough of the income of the road to pay the interest on these bonds, haven't you, ever since the bonds were issued?

A. I have.

Q. What rate of interest did the bonds bear?

A. Five per cent.

Q. Whether you knew or was informed, immediately after the decision of the court, of the fact that the court had decided to appoint trustees here under the old mortgage of 1871. Whether you were informed of the fact very soon after?

A. I don't recollect.

Q. You knew of the fact, didn't you?

175 A. Of course I must have known it.

Q. You knew it pretty soon afterwards, didn't you?

A. I can't say when.

Q. The opinion of the court was announced in August, 1892. How long was it after that time before you knew about it?

A. I don't recollect.

Q. Have you any doubt but that you knew about it within a month after that time, or even within three days after that time?

A. Possibly I may have known within three days, and perhaps not for three months.

Q. Have you any doubt but that you knew about it within a month?

A. I can't state. The presumption is I heard of it.

Q. Whether these different station agents on your route have the control of the depots, and buildings, and freights, and the selling of passenger tickets at each of the stations?

A. They have the control under the management of the road.

Q. They have the actual, personal control?

A. They have the personal control; yes.

Q. I don't care about the management of the road. That is not an answer to my question. I am inquiring whether, as a matter of fact, those men generally have control of the stations, of the freight buildings, the selling of tickets and the reception of freight and sending it off?

A. They do.

Direct resumed:

Q. Who is the superintendent of the Somerset railway?

(Objected to.)

A. William M. Ayer.

Q. Who has the appointment of the station agents on the road?

A. That is within the province of the president of the road.

Q. Do you know under whose direction the station agents are?

A. Under the direction of the superintendent.

Q. You say that the station agents have the control of the stations. I ask you whether or not that control is under the general direction of the superintendent.

176 A. It is.

Q. Do the station agents have any control or possession whatever as against the superintendent?

A. They do not.

Q. Who is authorized to dismiss, to discharge?

A. The superintendent.

Q. May he do so at will?

A. He can.

Q. You have been inquired of in relation to the payments of money as treasurer, whether you paid it under the direction of John Ayer, or under whose direction. I will ask you what you regard as a proper voucher for you to pay money out of the treasury of the Somerset railway, as its treasurer.

A. If I am paying the coupon interest, I should say the coupons were the proper vouchers.

Q. You record those as interest charges?

A. Yes.

Q. About your miscellaneous bills, by whom are they approved?

A. Approved by the superintendent.

Q. Upon approval of the bill by the superintendent do you pay it?

A. We have a paymaster who disburses money under my direction, and takes receipts therefor.

Q. And those bills come in and you enter them on the book as treasurer of the company?

A. Yes, sir.

Q. Any disbursements by you, or the paymaster through you, or by the board of directors, or are the disbursements all made generally by the superintendent?

A. They are made generally by the superintendent; they are submitted to the president for his approval in some cases.

Cross resumed :

Q. What is Mr. Greely's business in connection with the management of the road?

A. He is paymaster and accountant.

177 Q. Does he have an office in the same building occupied by the company?

A. He does, he occupies my office, virtually.

Q. Won't you tell me what his duties are as paymaster?

A. To disburse the cash under my direction.

Q. To pay the cash under your direction on what?

A. On all bills that accumulate in the legitimate expenses of the road.

Q. See if I understand you; for any bill incurred in the running and management of the road, if directed by you, he pays?

A. He does.

Q. Can you give me an idea, by mentioning two or three of three or four specimens, such bills as he ordinarily pays?

A. The regular monthly pay-rolls.

Q. He pays all the hands on the road?

A. He pays all the hands on the road; yes sir.

Q. Does he pay all these station agents?

A. He does.

Q. Does he pay the conductors?

A. He does.

Q. Does he have anything to do with collecting in the freight bills—aids in doing that?

A. He aids in doing it; yes sir. Perhaps I don't quite understand that; in collecting the freight bills direct from the parties?

Q. Yes, from the parties.

A. No, that is done by the station agents altogether. I misunderstood you.

Q. Does he collect the freight bills from the station agents?

A. He receives the money from them.

Q. He receives the money for the freight bills from the station agents?

A. Yes, sir.

Q. And brings it to you?

A. No; it comes addressed to me as treasurer. All this money comes addressed to me as treasurer and is passed into his hands as my book-keeper or accountant, and for which I am directly responsible. He has no authority except through me. That covers it.

Q. Under your authority?

A. Yes, sir.

Q. You have instructions, I think you told me, from Mr. Ayer?

A. Yes, sir.

Q. And under your authority, and Mr. Ayer's he pays the common hands of the road, does he?

A. He does.

Q. The brakemen and all of the help you employ including the conductors?

A. He does.

Q. The conductors upon that road have charge of the trains and the passengers, do they not?

A. They do.

Q. And by the conductors I refer to I mean the conductors that are mentioned in our writ of entry?

A. Yes, I understand you.

Q. Are there any other conductors except what are mentioned in that writ of entry?

A. How many do you mention?

(By Mr. WEBB:)

Q. Two.

A. Two, that is all; we have two regular conductors.

Q. Who are the two conductors?

A. Frank Merrill and D. L. Foster.

Q. In a general way—I don't suppose there is any need of being very particular or technical about it—the conductors have charge of the trains and the running of the trains, and the passengers, do they not?

A. They do.

Q. And the collecting of passenger money, if it is not paid at the stations?

A. They do.

Q. What charge do the conductors have over the freights on the road, more or less or all of it?

A. Simply the handling of the freight, nothing more.

179 Q. The conductors, then, have charge of all the freight upon road?

A. They do.

Q. Handling it and transporting it?

A. Handling it and transporting it.

Direct resumed :

Q. You have been inquired of as to where Mr. Greely held his office. I will ask you if the Somerset railway have a building at the corner of Water and Main streets, in Oakland, about 100 rods from its location, where its general offices are located?

A. They rent a building, yes sir.

Q. State what officers of the company have their offices in that building?

A. President, superintendent and treasurer.

Q. The auditor?

A. No sir.

Q. The accountant, Mr. Greely, does he have an office in the same building?

A. He occupies my office, the treasurer's office.

Q. You may state whether this building is in the village of Oakland.

A. It is in the village of Oakland.

Q. Away from the railway 100 rods?

A. Yes.

JOHN AYER, sworn for the plaintiff, testified :

Q. Are you the president of the Somerset railway?

A. Yes sir.

Q. How long have you been the president of the Somerset railway?

A. Since its organization.

Q. Were you the president of the Somerset Railroad Company?

A. Yes sir.

Q. How long were you president of that company?

A. Since June, 1872, up to the new organization.

180 Q. Were you connected with the Somerset Railroad Company from the time of its inception and building down to the formation of the new company, in 1883?

A. Yes sir, I think I was.

Q. Did you have the active work in the building of the road and equipping it?

A. Mainly.

Q. Did you have to do with the selling of the bonds of the railroad company that were issued in 1871?

A. I did sir; a portion of them.

Q. Was there a committee of finance appointed by the company?

A. There was.

Q. Were you a member of that committee?

A. I was.

Q. Do you now recall your associates upon the committee?

A. I think Mr. Gray and Col. Rowe.

Q. Joel Gray and Edward Rowe?

A. Yes sir.

Q. How many bonds of the \$500,000 which were authorized by the corporation were actually issued and executed and put out?

A. \$450,000.

Q. Do you know about the sale of the bonds, at what prices they were sold?

A. Yes sir.

Q. Were they all sold *bona fide*?

A. I understand so.

Q. Did you, yourself, sell some of the bonds before Maj. Small came in as treasurer?

A. I did.

Q. How many of the bonds did you sell?

A. Well, sir; I sold and received pay for \$138,600. That includes the \$31,000 that has been spoken of here as delivered to Mr. Gray. Those out leaves \$107,000.

Q. Do you know at what prices you disposed of those bonds?

A. Yes sir.

181 Q. You may state.

A. I sold \$19,000 to Reuben B. Dunn at ninety cents on a dollar, and \$1,000 I sold to him and he paid me par for. He had \$20,000 of me.

Q. State how the price for the \$19,000 was fixed at ninety cents on the dollar?

A. The finance committee were authorized by the directors, as we understood it, to sell the bonds, to do what was best for the interest of the company.

Q. And was the sale made by you as president of the company and a member of the committee on finance?

A. Yes sir.

Q. You may go on and state what further prices you received for bonds?

A. I received par for the balance of the bonds.

(By Mr. STEWART:)

Q. Balance of what, the \$138,600?

A. \$107,400.

Q. Was the money that you received from all the bonds described as sold by you turned into the treasury of the company?

A. It was.

Q. Have you, as president of the company and a member of the committee of finance, a knowledge of how that money was applied?

A. Yes.

Q. You may state in general terms.

A. It was all applied to the construction of the road, the money that I received from Mr. Dunn was.

Q. Do you know whether all the money received from the \$450,000 of bonds was applied to the construction and equipment of the road?

A. Yes sir, I understand so.

Q. Do you know what year the company ceased to pay the coupons on its bonds?

A. I understand only from what Mr. Small has stated here.

Q. Was it 1878?

A. 1878.

182 Q. Has the company, since that time, paid any of the coupons, to your knowledge?

A. Not to my knowledge.

Q. What was the financial condition of the company as to being solvent or insolvent in the early part of the year 1883, before the new corporation was formed?

A. Well sir, I think they were insolvent, very badly so.

Q. Was it able to meet its current liabilities?

A. No sir.

Q. At that time did the road extend from Oakland to North Anson?

A. Yes.

Q. Were there at that time suits pending against the company?

A. Yes sir.

Q. For liabilities that it was unable to meet?

A. Yes.

Q. Had you knowledge of the committee that was appointed by the bondholders to investigate the financial condition of the company and to make a report to the stockholders?

A. Yes.

Q. Consisting of Mr. Lindsey, Mr. Drummond and others?

A. Yes sir.

Q. Whether or not you gave to any members of the committee any facilities for examining into the condition of the company as to its financial condition?

A. We did, sir.

Q. Did you have knowledge of the report that they made to the stockholders of the company, which report the company afterwards accepted?

A. I did.

Q. Was the statement of the financial condition of the company which they embodied in their report, true to your knowledge?

A. Substantially so.

Q. Were you present at any meeting of the bondholders called for the organization of the new company, the Somerset railway?

183 A. I was.

Q. Do you know whether or not the bonds which were held by the Dunn Edge Tool Company were present and exhibited at that time?

A. I do.

Q. Did you at that time have knowledge of how many of the bonds out of the \$450,000 were present at that meeting? Were you on the committee?

A. I was not.

Q. Did you have knowledge of how many were present at the time?

A. About \$350,000 I have in my mind.

Q. You may state how many of the Dunn Edge Tool Company bonds were there.

A. Some two hundred, or two hundred and fourteen thousand. It is a matter of record. I may not be exactly correct.

Q. Did you have some bonds yourself?

A. I had \$2,000.

Q. Were they present at that meeting?

A. They were.

Q. After the organization of the new company at that meeting in August, 1883, were you elected a director?

A. I was.

Q. And have you been a director ever since?

A. Yes.

Q. Do you have knowledge of the mortgage that was issued by the new company to Bodwell and others to secure the payment of \$225,000 of bonds?

A. Yes, sir.

Q. Were the \$225,000 in bonds issued by the company?

A. Yes.

Q. Do you have knowledge of the selling of the bonds?

A. Yes.

Q. Were the \$225,000 in bonds all sold?

A. They were.

Q. At what prices?

A. Ninety cents on the dollar.

184 Q. Did the proceeds of the sale of the bonds go into the treasury of the company?

A. Yes.

Q. Do you know what application was made of the proceeds of the bonds?

A. The construction of the extension from North Anson to Bingham.

Q. How many miles is that?

A. About sixteen.

Q. Did you have charge of the construction?

A. I did.

Q. And of the application of the money?

A. Yes.

Q. What is the general condition of the old road, so to speak, from Oakland up to North Anson, as compared with its serviceable condition before the organization of the new company?

A. I think it is in better condition than it was then.

Q. In what respect?

A. It is better ditched, has been better sleepered and better railed.

Q. Have you put on all new rails over that distance?

A. Of the twenty-five miles we have about twenty-two and a half laid with steel rails, from Oakland to within twenty-two or twenty-two and one-half miles from North Anson.

Q. Any improvement in the stations on the line of the railroad?

A. Well, I should think the condition of the stations was fully maintained and some improved.

Q. How about the bridges across the Kennebec at Norridgewock and Madison?

A. They are kept in good repair.

Q. Can you state the time when the new corporation, the present corporation, took possession of the old road?

A. September 1, 1883.

Q. And have run it ever since?

A. Yes, sir.

185 Q. I will ask you whether the earning capacity of the old part of the road, from Oakland to North Anson, has been increased by the building of the addition from North Anson up to Bingham?

A. Yes, sir; I think it has.

Q. Will you state whether the building of the extension from North Anson up to Bingham was in anywise necessary to the preservation of the other property from North Anson down to Oakland?

A. It was, in my opinion.

Q. You may state the reasons why?

A. Well, sir, surveys had been made across direct—perhaps they could be made from Skowhegan to Solon and up to Bingham and above, and it was under the direction of Gov. Coburn, as I understood.

Q. From the Maine Central?

A. The Maine Central, perhaps afterward by Mr. Keen who had a large shoe factory at Skowhegan and interested himself very much in the matter, and called upon the railroad commissioners to grant him a charter across there. We were continually annoyed by the surveys made by the different parties across there.

Q. Whether the territory across from North Anson and population and business would warrant the building of more than one road?

A. I should think not.

Q. Whether your board of directors, or your old Somerset railway regarded it as expedient to build from North Anson to Bingham in order to protect or preserve the other part of the road from North Anson down — Oakland?

A. Yes; that was the judgment of the directors.

Q. State what particular advantage the building of the extension from North Anson up to Bingham gave to the old part of the road?

A. It gave it a chance to develop the water power at Carratunk Falls, or Solon.

Q. Describe that in brief. How many tons of freight does that afford the company at the present time?

186 A. They are giving us now about one hundred tons a day, a little above.

Q. How many miles is that from North Anson, the terminus of the old part of the road?

A. About eight and three-quarter miles.

Q. Was or not that pulp mill built at Solon upon the understanding that the Somerset road should be extended up there to accommodate it and its freight matters?

A. Yes, sir.

Q. And was the works built at Solon at the same time you were constructing the road?

A. At the same time we were constructing the road.

Q. Did you build a bridge across the Kennebec at Carratunk out of the proceeds of this \$225,000?

A. Well, if we didn't we borrowed the money.

Q. Did you construct a branch line from the main line into the Dodlin granite quarry?

A. Yes, sir; in 1887.

Q. Do you know whether any part of that construction or equipment was paid for out of the proceeds of the \$225,000?

A. Well, I think so.

Q. Whether or not that branch from the main line into the Dodlin quarry increases the value of the entire road?

A. It does, in my opinion.

Q. You may state the object of that, and the value of it to the road, in general terms?

A. Well, we think we have a very important quarry at Dodlin and Norridgewock, and it was a mile from the road and a very level and easy chance to track the road to it. We built it there, and have had a pretty fair business, generally, since its construction; hauled a good deal of stone over it.

Cross-examination by D. D. STEWART, Esq.:

Q. To whom did you sell the \$107,400 of bonds?

A. To various parties.

Q. Won't you be kind enough to state who they were, as well as you can?

187 A. I can't give you the names of all.

Q. Of as many as you can.

A. I delivered to, or sold to, S. S. Thompson, or delivered them to Mr. Drummond for him as per agreement, \$25,000. I delivered to the town of Norridgewock, \$30,000. I think the \$30,000 for Norridgewock were delivered to A. D. Brown. I delivered to F. W. Hill \$8,300, sold to him; R. B. Dunn, \$20,000. These bonds were all paid for to me. S. C. Mills about \$4,700 for work. Mr. Thompson was the original contractor to build the road, and he left the road and Mr. Mills went on and did the work for us. We paid him so much, \$4,700, in bonds. I delivered Thomas Flint, \$4,000; Benjamin Flint, \$10,000; C. L. Luce, who did work on the road also as a contractor, \$1,700. That, I think, amounts to about \$103,700. The others I delivered in small lots to various parties for supplies they furnished and for work they did.

Q. Now, what do you know about what has been done with the bonds since Mr. Small became treasurer? These bonds that you have been speaking of were all disposed of before he became treasurer, as I understand it?

A. Yes.

Q. Now won't you state what has been done with the bonds since he has been treasurer?

A. Mr. Small's testimony and records show better than I can tell you.

Q. You mean by that answer that you really cannot tell?

A. I can tell something about it, because a great many of them were sold according to my direction, and delivered according to my direction, but I can't tell you how many or just to whom now; but just according to his memorandum, without any doubt.

Q. If the stenographer says Mr. Small says he has been treasurer and can tell better than I can about the sale of bonds since, that is what you mean to be understood?

A. He can tell better to whom they were delivered. I could not recollect, and I have no memorandum myself.

Q. Mr. Small gives a categorical account, I think, of the
188 bonds, and I understand the substance of your answer is to confirm what Mr. Small says, so far as you can confirm it?

A. Exactly. I want to refer to the first answer to the first question asked me as to how many bonds I sold, \$138,600 less the \$31,000 delivered to Gray that he settled for or Mr. Small settled for. There was a difference of \$200 between Mr. Small's account and mine. I make it \$107,600, and, deducting the \$31,000, I think he has \$107,400, a difference of \$200. I can't tell just how it comes.

Q. We don't propose to make any particular inquiry into any discrepancy between you and Mr. Small. Now I want to inquire if you were one of the parties in the defense to the writs of entry which were brought to recover this railroad property.

A. Yes.

Q. I want to know how soon after the opinion of the court was announced, appointing new trustees—whether you did not know it very soon after it was announced?

A. I don't think I did, sir, for, I should say, perhaps weeks. I never received any official announcement.

Q. Wasn't you informed by Mr. Webb pretty soon afterwards?

A. I don't think I was, sir.

Q. How long afterwards?

A. I couldn't tell you. All I knew about it was from sort of a general report.

Q. Mr. Webb was your counsel in the case?

A. Yes, sir. I don't recollect receiving any notification from Mr. Webb.

Q. You knew it before a great while afterwards?

A. I think some little time.

Q. About how long, according to your best recollection, would you be willing to say it was before you heard of it?

A. I don't believe I knew anything about it for two weeks, from the best recollection that I have.

Q. If it had been the other way I think you would have heard of it a week sooner?

A. Possibly.

189 Counsel for the plaintiff also offers in evidence the following extracts from the records of the directors of the Somerset Railroad Company, viz:

From page 76, under date of June 11, 1873:

"Mr. Ayer, Gray and Rowe were chosen a committee on finance, with full power and authority to manage the financial affairs of the company as in their judgment will best promote the interest of the company."

From page 82, under date of October 15th, 1874:

"Voted, that the president be authorized to dispose of bonds of the company to the amount of \$100,000 at the rate of ninety per cent. and the interest accrued up to the first day of November, A. D. 1874."

From page 91, under date of November 18, 1875:

"Voted, that the settlement between the Somerset Railroad Company and the Dunn Edge Tool Company, as audited by Edward Rowe, auditor, January 28, 1875, be approved and confirmed as entered on the treasurer's account."

The foregoing is a true report of the evidence in behalf of the plaintiff taken by me.

J. A. HAYDEN,
Official Stenographer.

(Testimony Taken in Behalf of the Complainant, at Waterville, on the Fourth Day of December, A. D. 1893, by the Undersigned, Deposition and Disclosure Commissioner.)

E. F. Webb, in behalf of the complainant offered the location of the Somerset Railroad Company made in 1870, from Oakland, then West Waterville, to North Anson, as filed with the county commissioners of — county on the — day of —, A. D. —, as follows, viz:

Location of Road as Filed in Somerset County.

Commencing at a point eighteen hundred ninety feet (1,890) below the west end of passenger station of the Maine Central
190 railroad at the village of West Waterville, and twelve feet (12) distant from the center of the main track of said road measured northwesterly at right angles from said main track, thence curving to left with radius of nine hundred fifty-five feet (955) two hundred thirty-eight feet (238) thence about north thirty-eight degrees fifty minutes east (N. 38° 50' E.), twenty-six hundred thirty feet (2,630), thence curving to right with radius of twenty-eight sixty-five feet (2,865) six hundred fifty feet (650), thence on a tangent, on a course about north fifty-two degrees east (N. 52° E.) nineteen hundred eighty-two feet (1,982), thence curving to left with radius of twenty-eight hundred sixty-five feet (2,865) nine hundred ninety-three feet (993), thence curving to left with radius of four thousand six hundred ninety-seven feet (4,697) eighteen hundred sixty-nine feet (1,869), thence on a tangent on a course about north eight degrees forty minutes east (N. 8° 40' E.) fourteen hundred ninety-six feet (1,496) thence curving to left with radius of nineteen hundred ten feet (1,910) five hundred fifty feet (550), thence on a tangent on a course about north seven degrees fifteen minutes west

(N. $7^{\circ} 15'$ W.) twenty-five hundred eighty feet (2,580), thence curving to left with radius of five thousand seven hundred thirty feet (5,730) five hundred ninety feet (590), thence on a tangent on a course about north thirteen degrees ten minutes west (N. $13^{\circ} 10'$ W.) ten thousand, one hundred forty-five feet (10,145), thence curving to left with radius of eleven thousand, four hundred sixty feet (11,460) six hundred fifty-three feet (653), thence on a tangent on a course about north sixteen degrees twenty-five minutes west (N. $16^{\circ} 25'$ W.) six hundred ninety-eight feet (698), thence curving to right with radius of five thousand seven hundred thirty feet (5,730), sixteen hundred fifty-six feet (1,656), thence on a tangent on a course about due north fifteen hundred seventy-eight feet (1,578), thence curving to left with radius of five thousand, seven hundred thirty feet (5,730) eight hundred feet (800), thence on a tangent on a course about north eight degrees west (8° W.) fourteen hundred eighty-five feet (1,485), thence curving to right with radius of five thousand, seven hundred thirty feet (5,730) seven hundred sixty-four feet (764), thence on a tangent on a course about north 191 twenty minutes west (N. $0^{\circ} 20'$ W.) seven hundred forty-two feet (742), thence curving to right with radius of five thousand, seven hundred thirty feet (5,730) five hundred thirty-four feet (534), thence on a tangent on a course about north five degrees east (N. 5° E.), nine hundred eighty-six feet (986), thence curving to right with radius of twenty-eight hundred sixty-five feet (2,865) eight hundred fifty feet (850), thence on a tangent on a course about north twenty-two degrees east (N. 22° E.) eleven hundred thirty-nine feet (1,139), thence curving to left with radius of nineteen hundred ten feet (1,910) fifteen hundred twenty-five — (1,525), thence on a tangent on a course about north twenty-three degrees forty-five minutes west (N. $23^{\circ} 45'$ W.) forty-nine hundred eighty-four feet (4,984), thence curving to left with radius of twenty-eight hundred sixty-five feet (2,865) eight hundred forty-four feet (844), thence on a tangent on a course about north forty degrees forty minutes west (N. $40^{\circ} 40'$ W.) seven hundred seventeen and one-half feet ($717\frac{1}{2}$), thence curving to right with radius of fourteen hundred thirty-three feet (1,433) eight hundred feet (800), thence on a tangent on a course about north eight degrees forty minutes west (N. $8^{\circ} 40'$ W.) twenty-seven hundred twenty-one feet (2,721), thence curving to left with radius of twenty-eight hundred sixty-five feet (2,865) seven hundred fifty feet (750), thence on a tangent on a course about north twenty-seven degrees forty minutes west (N. $27^{\circ} 40'$ W.) fourteen hundred twenty feet (1,420), thence curving to right with radius of nineteen hundred ten feet (1,910) six hundred eighty feet (680), thence on a tangent on a course about north three and a quarter degrees west (N. $3\frac{1}{4}^{\circ}$ W.) twelve thousand, one hundred feet (12,100), thence curving to left with radius of nineteen hundred and ten feet (1,910) thirteen hundred fifty feet, thence on a tangent on a course about north forty-three degrees forty minutes west (N. $43^{\circ} 40'$ W.) seven hundred thirty-four feet (734), thence curving to right with radius of nineteen hundred ten feet (1,910) seven hundred eighty-three feet (783), thence on a tangent on a

course about north twenty degrees fifteen minutes west (N. $20^{\circ} 15'$ W.) twelve hundred ninety-nine feet (1,299), thence curving to left with radius of eleven hundred forty-six feet (1,146) seven hundred forty feet (740), thence on a tangent with course about north fifty-seven degrees ten minutes west (N. $57^{\circ} 10'$ W.) eight hundred forty-four feet (844), thence curving to right with radius of eleven hundred forty-six feet (1,146) five hundred fifty feet (550), thence on a tangent on a course about north twenty-nine degrees forty minutes west (N. $29^{\circ} 40'$ W.) crossing the Kennebec river in the town of Norridgewock, seven hundred fifty feet (750), thence curving to left with radius of eleven hundred forty-six feet (1,146) six hundred feet (600), thence on a tangent on a course about north fifty-nine degrees forty minutes west (N. $59^{\circ} 40'$ W.) three hundred feet (300), thence curving to right with radius of fourteen hundred thirty-three feet (1,433) seven hundred eighty feet (780), thence on a tangent on a course about north twenty-eight degrees thirty minutes west (N. $28^{\circ} 30'$ W.) thirty-four hundred twenty-one feet (3,421), thence curving to right with radius of twenty-eight hundred sixty-five feet (2,865) three hundred ninety-one — (391), thence on a tangent on a course about north twenty degrees forty minutes west (N. $20^{\circ} 40'$ W.) two thousand forty-eight feet (2,048), thence curving to left with radius of twenty-two thousand nine hundred twenty feet (22,920) seven hundred fifty feet (750), thence on a tangent on a course about north twenty-two degrees thirty minutes west (N. $22^{\circ} 30'$ W.) five thousand four hundred feet (5,400), thence curving to left with radius of nineteen hundred ten feet (1,910) eight hundred feet (800), thence on a tangent on a course about north forty-six and one-half degrees west (N. $46\frac{1}{2}^{\circ}$ W.) four thousand two hundred feet (4,200), thence curving to right with radius of twenty-eight hundred sixty-five feet (2,865) thirteen hundred forty feet (1,340), thence on a tangent on a course about north nineteen degrees forty-five minutes west (N. $19^{\circ} 45'$ W.) fourteen hundred sixty-three feet crossing the highway above the house belonging to Amasa Bixby, thence curving to left with radius of twenty eight hundred sixty-five feet (2,865) eight hundred six feet (806), thence on a tangent on a course about north thirty-five degrees fifty minutes west (N. $35^{\circ} 50'$ W.) sixteen hundred forty-five and a half feet ($1,645\frac{1}{2}$), crossing the highway near the residence of S. Dumphy, thence curving to left with radius of five thousand, 193 seven hundred thirty feet (5,730) eleven hundred eighty-eight one-half feet ($1,188\frac{1}{2}$), thence on a tangent on a course about north forty-seven degrees forty-five minutes west (N. $47^{\circ} 45'$ W.) six hundred twenty-eight and one-half feet ($628\frac{1}{2}$), thence curving to right with radius of eleven hundred forty six feet (1,146) nine hundred feet, crossing the highway at the foot of the Stimpson hill, thence on a tangent on a course about north two degrees forty-five minutes west (N. $2^{\circ} 45'$ W.) two hundred six feet (206), thence curving to left with radius of eleven hundred forty-six feet (1,146) eleven hundred feet, thence on a tangent on a course about north fifty-seven degrees forty-five minutes west (N. $57^{\circ} 45'$ W.) seven hundred

eighty-six and one-half feet (786½), thence curving to right with radius of fourteen hundred thirty-three feet (1,433) fourteen hundred feet (1,400), thence on a tangent on a course about north one degree forty-five minutes west (N. 1° 45' W.) thirty-one hundred feet (3,100), crossing the highway at the foot of Old Point hill, thence curving to right with radius of twenty-eight hundred sixty-five feet (2,865) six hundred feet (600), thence on a tangent on a course about north ten degrees fifteen minutes east (N. 10° 15' E.) thirty-nine hundred feet (3,900) crossing the Kennebec river into the town of Anson, thence curving to left with radius of fourteen — thirty-three feet (1,433) six hundred feet (600), thence on a tangent on a course about north thirteen degrees forty-five minutes west (N. 13° 45' W.) two hundred feet (200), thence curving to left with radius of twenty-eight hundred sixty-five feet (2,865) four hundred feet (400), thence on a tangent on a course about north twenty-one degrees forty-five minutes west (N. 21° 45' W.) two hundred fifty feet (250), thence curving to right with radius of eleven hundred forty-six feet (1,146) twelve hundred fifty feet (1,250), crossing one highway between the residence of Mr. Tarr and Ambrose Dawes and another highway near the residence of John Spear, thence on a tangent on a course about north forty degrees forty-five minutes east (N. 40° 45' E.) three hundred feet, thence curving to left with radius of fourteen hundred thirty-three feet (1,433) thirteen hundred feet (1,300), thence on a tangent on a course about north
 194 eleven degrees fifteen minutes west (N. 11° 15' W.) nineteen hundred eighty-four feet (1,984), crossing a highway near its junction with the river road, thence curving to the right with radius of twenty-eight hundred sixty-five feet (2,865) twenty hundred forty feet (2,040), crossing a highway, thence on a tangent on a course of about north thirty degrees eighteen minutes east (N. 30° 18' E.) five thousand, two hundred seventy-three feet (5,273), thence curving to left with radius of nineteen hundred ten feet (1,910) fourteen hundred thirty-six feet (1,436), thence on a tangent on a course about north twelve degrees forty-seven minutes west (N. 12° 47' W.) seventy-four hundred thirty-three feet (7,433) thence curving to right with radius of nineteen hundred ten feet (1,910) eleven hundred ten feet (1,110) crossing the highway a short distance west of a barn belonging to Captain Asa Paine, thence on a tangent on a course about north twenty degrees thirty-six minutes east (N. 20° 36' E.) six hundred twenty-one feet (621) crossing the Carabassett river and the highway near the residence of J. J. Parlin.

The location of said road to be six rods wide or three rods on each side of the centre line; only the undersigned reserve to the said railroad company the right, under said act of incorporation to alter the aforesaid location if found desirable hereafter, agreeable to the requisitions of their charter filed with the county commissioners of said county of Somerset, the location hereinbefore set forth and according to an actual survey of the route of said road.

(Signed)

FRANCIS W. HILL, *President.*
 EDWARD ROWE, *Clerk.*

Given under the hands of us, the president and directors this seventeenth day of February, 1870.

A true record.

Attest:

EDWARD ROWE, *Clerk*.

The complainant offered in evidence a description of the location of the Somerset railway, commencing at railway station at North Anson; thence running on the west side of the Kennebec river to Carratunk Falls; thence crossing the Kennebec river to Solon; thence up the Kennebec river on the east side to Bingham, as filed October 5, A. D. 1887, with the county commissioners of the county of Somerset, as follows, viz:—

Description of Location of Somerset Railway through Somerset County, State of Maine, Commencing at Railway Station at North Anson and Running Northerly along the Center Line of Railway.

From station 1300 on main line of Somerset R'y track, at North Anson, the line runs on a tangent, bearing N.—

12° 56' W. to station 1316+04.5,	1,604.5
Thence by a 3° curve to right to station 1326+54.5,	1,050
Thence on a tangent N. 18° 36' E. to station 1332+90,	635.5
Thence on a 3° curve to right to station 1350+07,	1,717
Thence on a tangent N. 70° 06' E. to station 1363,	1,293
Thence on a 1° curve to right to station 1385,	2,200
Thence on a tangent S. 87° 54' E. to station 1408,	2,300
Thence on a 3° curve to left to station 1417+66½,	966½
Thence on a tangent N. 63° 06' E. to station 1425+95,	828½
Total	<hr/> 12,595
Thence on 3° curve to left to station 1444+90,	1,895
Thence on a tangent N. 6° 15' E. to station 1460+14,	1,524
Thence on a 1' curve to right to station 1465+09,	495
Thence on a tangent N. 11° 12' E. to 1498	3,291.8
Total	<hr/> 19,800.8

196 Length in feet nineteen thousand eight hundred and eight-tenths feet, to be 33 feet on each side of center line, and containing 30 acres more or less, in Anson township.

From station 1498 at Embden south line, location runs on a 2° curve to right

	to station 1512,	1,400
	Thence on a tangent N. 39° 12' E.	1,492.5
	to station 1526+92.5,	
	Thence on a 3° curve to left	824.5
	to station 1535+17,	
	Thence on a tangent N. 14° 27' E.	6,116
	to station 1596+33,	
	Thence on a 4° curve to left	1,492
	to station 1611+25,	
	Thence on a tangent N. 0° 28' W.	5,275
	to station 1664,	
	Thence on a 4° curve to right	950
	to 1673+50,	
	Thence on a tangent No. 37° 32' E.	1,150
	to station 1685,	
	Thence on a 4° curve to left	1,025
	to station 1695+25,	
	Thence on a tangent N. 3° 28' W.	375
	to station 1699,	
	Thence on a 5° curve to left	300
	to station 1702,	
	Thence on a tangent N. 18° 28' W.	308
	to station 1705+08,	
	Thence on 5° curve to right	460
	to station 1709+68,	
	Thence on a tangent N. 4° 32' E.	1,437
	to station 1724+05,	
	Thence on a 1° curve to left	190
	to station 1725+95=1742+95,	
	Thence on a tangent N. 2° 38' E.	255
	to station 1745+50,	
197	Thence on a 2° curve to right	120
	to station 1746+70,	
	Thence on a tangent N. 7° 26' E.	330
	to station 1750,	
	Thence on a 2° curve to right	600
	to station 1756,	
	Thence on a tangent N. 19° 26' E.	1,530
	to station 1771+36,	
	Thence on a 3° curve to right	458
	to station 1775+94,	
	Thence on a tangent N. 33° 10' E.	414.5
	to station 1780+08.5,	
	Thence on a 9° curve to right	639.5
	to station 1786+48,	
	Thence on a tangent S. 89° 26' E.	40
	to station 1786+88.	

SOMERSET, ss :

The foregoing is a true copy of so much of the location of the Somerset railway filed October 5, 1887, as extends from the railway station at North Anson, Somerset county, northerly to station 1786+88 in Embden, at which station the amended location of said railway filed May 29, A. D. 1889, commences; the first-mentioned location being recorded in the records of the county commissioners' court for Somerset county, vol. 6, pages 567-571.

Attest:

[L. S.]

N. W. BRAINERD,

*Clerk of County Commissioners' Court**for said County of Somerset.*

Also a description of the amended location of the Somerset railway, as filed by said company with the county commissioners of Somerset county on the twenty-ninth day of May, A. D. 1889, as follows, viz :

Description of amended location of Somerset railway through Somerset county, State of Maine, commencing at station 198 1786+88 of previously filed location, in the town of Embden, and running northerly along the line of railway.

From station 1786+88, on the line of the Somerset railway track in Embden, the line runs on 10° curve to the left to station 1789+88	300.00
Thence on a tangent N. 60° 34' E. to station 1790+10,	22.0
Thence on a 10° curve to right to station 1792+75,	265.0
Thence on a tangent N. 87° 04' E. to station 1795+10,	235.0
thence being the center of the Kennebec river at Carratunk Falls	822.0

Length in feet eight hundred and twenty-two feet, to be four rods wide and containing 1.24 acres, more or less, in Embden township.

Thence on a 4° curve to right to station 2024+70.4,	557.9
Thence on a tangent N. 23° 26' E. to station 2033+80,	909.6
Thence on a 2° curve to left to station 2036+80,	300.0
Thence on a tangent N. 17° 26' E. to station 2042+40,	560.0
Thence on a 3° curve to right to station 2049+15,	675.0
Thence on a 3° curve to left to station 2062+42.7,	1,327.7

	Thence on a tangent N. $2^{\circ} 09'$ W. to station 2063,	57.3
	Thence on a 5° curve to right to station 2068+50,	550.0
	Thence on a tangent N. $25^{\circ} 21'$ E. to station 2070+50,	200.0
	Thence on a 4° curve to left to station 2081+50,	1,100.0
199	Thence on a tangent N. $18^{\circ} 39'$ W. to station 2088+60,	710.0
	Thence on a 4° curve to right to station 2097,	840.0
	Thence on a tangent N. $14^{\circ} 57'$ E. to station 2098+50,	150.0
	Thence on 4° curve to left to station 2100+75,	225.0
	Total	8,162.5
	Thence on a tangent N. $5^{\circ} 57'$ E. to station 2127+33,	2,658.0
	Thence on a 3° curve to left to station 2137,	967.0
	Thence on a tangent N. $23^{\circ} 03'$ W. to station 2152+34,	1,534.0
	Thence on a 2° curve to left to station 2162+34,	1,000.0
	Thence on a tangent N. $43^{\circ} 03'$ W. to station 2196,	3,366.0
	Total	9,525.0
		8,162.5
		14,580.5
	Total	32,268.0

Length in feet thirty-two thousand two hundred and sixty-eight feet, to be four rods wide and containing 48.88 acres, more or less, in Bingham township.

From station 1795+10 at Solon west line the location runs—

	On a tangent N. $87^{\circ} 04'$ E. to station 1797+80,	270.00
	Thence on a 5° curve to left to station 1810+90,	1,310.0
	Thence on a tangent N. $21^{\circ} 34'$ E. to station 1833+37,	2,247.0
200	Thence on a 3° curve to left to station 1849+81.4,	1,644.4
	Thence on a tangent N. $27^{\circ} 56'$ W. to station 1858+21,	839.6

Thence on a 2° curve to right to station 1869+72.6,	1,151.6
Thence on a tangent N. 4° 54' W. to station 1873+32 Solon north line,	359.4
Total	<hr/> 7,822.0

Length in feet seven thousand eight hundred and twenty-two feet, to be four rods wide and containing 11.85 acres, more or less, in Solon township.

From station 1873+32 at Bingham south line the location runs—

On a tangent N. 4° 54' W. to station 1895+15,	2,183.0
Thence on a 4° 20' curve to right to station 1911+50,	1,635.0
Thence on a tangent N. 65° 57' E. to station 1920+87,	937.0
Thence on a 2° curve to left to station 1933+68.6,	1,281.6
Thence on a tangent N. 40° 19' E. to station 1951+50,	1,781.4
Thence on a 3° curve to right to station 1955+50,	400.0
Thence on a tangent N. 52° 19' E. to station 1962+10,	660.0
Thence on a 3° curve to left to station 1966+23,	413.0
Thence on a tangent N. 39° 54' E. to station 1974+75,	852.0
Thence on a 4° curve to left to station 1981+62.5,	687.5
Thence on a tangent N. 12° 23' E. to station 1998+61,	1,698.5
201 Thence on a 2° curve to left to station 2005+36,	675.0
Thence on a tangent N. 1° 07' W. to station 2019+12.5,	1,376.5
Total	<hr/> 14,580.5

The line above described is the line of the railway as amended and located from station 1786+88, in Embden, to station 2196 in Bingham, and the land taken is four rods wide throughout the entire length of said line.

To the honorable county commissioners for Somerset county, State of Maine:

The Somerset Railway Company of Somerset county, State of Maine, hereby files with your honorable board the foregoing as a portion of its location through Somerset county, the land taken

being four rods wide along the above-described location and throughout its entire length.

THE SOMERSET RAILWAY CO.,
By JOHN AYER, *President*.

SOMERSET, ss :

Received and filed 29th day of May, A. D. 1889.

Attest :

L. H. WEBB, *Clerk*.

SOMERSET, ss :

C. C. Court, March Adj'd Term.

JUNE 5, 1889.

Within amended location of Somerset railway is hereby approved.

ALBERT LEAVITT,
A. H. CHASE,
County Commissioners of Somerset.

SOMERSET, ss :

The foregoing is a true copy of record of amended location of Somerset Railway Company as recorded in the records of the county commissioners' court for the county of Somerset, vol. 7, page-113-115.

Attest :

[L. s.]

N. W. BRAINERD,
Clerk of County Commissioners for said County of Somerset

202 *Testimony of William M. Ayer, Offered by the Complainant.*

Mr. AYER, after being duly sworn, testified as follows, in answer to interrogatories by Hon. E. F. Webb, counsel for plaintiff:

Q. State your full name and residence.

A. William M. Ayer, Oakland.

Q. What is your occupation?

A. Superintendent of the Somerset railway.

Q. How long have you been acting as superintendent of the railway?

A. Twelve years or more. I will amend that—since its organization.

Q. And were you superintendent of the Somerset Railroad Company prior to the organization of the Somerset railway?

A. Yes, sir.

Q. State the terminals of the present Somerset railway as they have existed since 1888?

A. Oakland, south; Bingham, north.

Q. State the length of the railway.

A. Forty-one miles.

Q. Whether the Somerset railway has any station at Oakland?

A. No, sir.

Q. State who does the station business of freight and passengers at Oakland, its southern terminal.

A. We use the Maine Central station.

Q. State the name of the station agent.

A. H. A. Burrill.

Q. Whether or not Mr. Burrill is also the station agent of the Maine Central Railroad Co.?

A. He is.

Q. Whether or not the tickets of the Somerset railway and the tickets of the M. C. R. R. Co. are sold by Mr. Burrill in the same office?

A. They are.

Q. Whether or not the station occupied by Mr. Burrill at Oakland is upon land controlled by the Somerset railway or upon land controlled by the Maine Central Railroad Co.?

203 A. By the Maine Central.

Q. Starting at Oakland and passing northerly upon the line of the Somerset railway, which is the next station approached?

A. Norridgewock is the first billing station.

Q. Who is the station agent at Norridgewock?

A. W. S. Tobey.

Q. How long has he been station agent?

A. Since the railway organized.

Q. State how long Mr. Burrill at Oakland has been station agent for the company.

A. I should say about six years.

Q. State, if you know, whether the station building at South Norridgewock is within or without the right of way.

A. I should say it was within the right of way.

Q. State the length and width of the station building at South Norridgewock, approximately.

A. It is 120 feet in length and 24 feet wide.

Q. Passing from South Norridgewock northerly, what is the next station?

A. Madison.

Q. Who is the station agent and how long has he been there?

A. F. H. Pease; about four months.

Q. State whether that station building is within or without the location.

A. It is partly within and partly without.

Q. Who owns the station building?

A. The citizens of Madison.

Q. Upon whose land does that portion of the building set that is without the location of the Somerset railway?

A. Certain citizens of Madison.

Q. Do you know the persons who owns the land?

A. I think the citizens of Madison own it. It is either partly on the highway that runs there or owned by citizens.

Q. What portion of that building approximately is upon the

land controlled by the Somerset railway? And what portion upon the land of the citizens of Madison?

204 A. About two-thirds upon the railway, about one-third on land owned by the citizens.

(By Mr. STEWART:)

Q. He says that the citizens of Madison own the depot building there. Does he mean by that that they erected the building themselves?

Mr. WEBB: State who erected the station building.

A. I do not wish to be understood that the citizens of Madison as a town own the building—not as a town but owned by certain citizens of Madison who live there.

Q. Does not Mr. Powers own it?

A. No, sir.

Mr. STEWART: Whether the station building at Madison is on the land of certain citizens of Madison by their consent?

A. I won't be able to answer that question positively.

Mr. STEWART: If he cannot tell that I shall object to the whole of it.

(Defendants' counsel objects to this mode of proving title to the land of the building.)

Q. Is a part of the railway station at Madison within the location of the Somerset railway and is a part of the building outside the location of the railway?

A. Yes.

Q. State the size of the station building approximately at Madison.

A. 60 feet long by 20 feet in width.

Q. Passing northerly on the line of the Somerset railway, what is the next station?

A. Anson.

Q. Is the station building at Anson within or without the location of the railway?

A. I think it is partly within and partly without the location.

Q. What is the size of the building?

A. The station is not owned by the company. It is a store.

Q. How does the company have the possession of it?

A. It is on the company's land.

Q. Is it occupied as well for a store as a station?

A. Yes, sir.

205 Q. Is the station agent also the trader in the store?

A. No.

Q. Who is the station agent at that point?

A. F. L. Powers.

Q. Who is the owner and occupier of the store as a trader?

A. Gilman.

Q. What portion of that store is within the location?

A. I should say about one-third.

Q. Passing from Anson northerly on the line of the railway, what is the next station?

A. North Anson.

Q. Is that station building within or without the location?

A. It is without the location.

Q. Do you know upon whose land the building sets?

A. On Mr. John Ayer's land.

Q. State the size of the station building at North Anson?

A. It is 120 feet long, by 24 in width.

Q. State the width of the location of the road from its terminal in Oakland, to the station at North Anson?

A. Six rods.

Q. Passing from North Anson northerly on the line of the railway, what is the next station?

A. Embden.

Q. Is the station there within or without the location?

A. It is partly within and partly without.

Q. What is the size of the building?

A. 70 feet long by 25 feet in width.

Q. What portion of the building is within the location?

A. Two-thirds, I should say.

Q. Upon whose land does that portion of the building set that is not within the location?

A. A. J. Libby's.

Q. What is the next station northerly from Embden?

A. Solon.

Q. Is the station building within or without the location?

A. It is within the location.

Q. What is the size of it?

206 A. 60 by 16.

Q. What is the next station northerly from Solon?

A. Bingham.

Q. Is that station within or without the location?

A. Part of it is within the location and part without.

Q. What portion of it is within the location?

A. I should say two-thirds were within the location.

Q. Upon whose land does that portion of it set that is without the location?

A. The railway company's.

Q. Is that the most northerly terminal of the line of the Somerset railway?

A. Yes.

Q. What is the width of the location of the Somerset railway from its station at North Anson to its station at Bingham?

A. Four rods.

Q. Whether or not you have issued a printed what is called "Employés' Time Table of the Somerset Railway," containing regulations for the management of trains and stations, &c.?

A. Yes.

Q. Whether or not it contains any regulations or stipulations of the duties of station agents?

A. It does.

Q. I show you such a time-table containing such regulations, and will read items No. 25 and No. 26 pertaining to the duties and powers of station agents.

"Item 25.—Station agents have charge of the company's property at their respective stations and the general direction of the business of the road at their stations, subject to the general rules and special orders."

"Item 26.—They will see that all parts of the station buildings and yards are kept neat and clean, and must not permit disorderly or idle persons to loiter around the premises to the danger of property or the annoyance of passengers."

(An "employés' time-table," containing regulations for the management of trains, etc., is to be annexed to each copy of the case, but is not to be printed in the case.)

207 Q. Are there any other duties connected with the station agents other than the directions specified in items 25 and 26, that you know of?

A. There are the duties that are assigned to them from day to day.

Q. By whom?

A. The superintendent.

Q. Whether or not the station agents are at all times under the direction of the superintendent in all matters pertaining to their employment?

A. Yes.

Cross-examination by Hon. D. D. STEWART, counsel for the defendants:

Q. Whether the station agents at each of the stations do not sell all the tickets?

A. Yes.

Q. You say they do?

A. They do.

Q. Whether the station agents of the defendants' stations do not have the control and management, or the control, of the freight that is left at the stations—freight both to be sent off and freight received?

A. Yes.

Q. Whether anybody else except the station agents have any control of the station and the depot and buildings of the company where they are stationed—I mean actual control, I do not mean to inquire about your general control, but whether the station agents have not entire control in the absence of the superintendent at least?

A. They have control of the stations.

Q. And control of the station includes the management of the business and the control of the company's property?

A. So far as the general duties go.

Q. And then you give them special duties outside of the general rules?

A. Yes.

208 Q. As you have occasion?

A. Yes.

Q. So that they are the servants and agents of the superintendent or of the company?

A. The servants of the company.

Q. And in control of the property so far as they have control under the superintendent, that is, yourself?

A. Yes.

Q. Whether in relation to any of these station buildings that are not within the company's lands, the company have written leases or deed or any written instrument?

A. Shall I take that in detail or as a general question?

Q. I inquired about all of these stations. You have spoken of two or three which you say are partly within the location of the company and partly on outside lands?

A. I can't answer that in one general answer—they are not all alike.

Q. You know that some of them are?

A. Yes, sir.

Q. I would like to have you state which one that is not included in that answer.

A. The station at Embden is not included.

Q. What right have the company to keep that station?

A. They have no right to the land outside of its location, no more than the word of mouth, the permission of Mr. Libby.

Q. Who erected the building at the Embden station? Was not it done by the company?

A. Yes.

Q. So the company own the building?

A. Yes.

Q. And own most of the land?

A. Yes, about two-thirds of it I should say. Mr. Libby had agreed to convey to the company the right of way to the land which the station sets on but he has failed to do so.

Q. Was there any controversy between the company and Mr. Libby any way?

A. No, sir.

209 Q. You expect him to do so some time?

A. Yes.

Q. Now at Oakland have not the company some buildings that they own of themselves or rent for themselves where they do their business?

A. Not as station purposes.

Q. Where is Mr. Small's office? In what building?

A. In the Dunn Edge Tool Company's building?

Q. Mr. Small acts as a treasurer of the Somerset railway?

A. Yes.

Q. And he was treasurer of the original Somerset Railroad Company?

A. Yes.

Q. Did not he have his office as treasurer for the original Somerset Railroad Company in the same building as now?

A. Yes.

Q. What other offices did the Somerset Railroad Company have or occupy in this Dunn Edge Tool Company's building?

A. The superintendent's office is there.

Q. Your office?

A. Yes. And the accountant's office is there—the paymaster.

Q. I am inquiring about the Dunn Edge Tool Company's building.

A. Yes.

Q. The offices that are located in that building?

A. Yes.

Q. You have stated them all now?

A. Yes.

Q. Whether or not you or John Ayer pays to that Dunn Edge Tool Company rent for the use of the building?

A. The company pays for them.

Q. It is paid by Mr. Small?

A. Yes.

Q. Supposing there is not any company then I suppose it is paid by Mr. Small? Mr. Small makes the payments I understand?

A. Yes.

210 Q. Mr. Small makes the payments, does he not to these station agents for their services on the road generally?

A. Yes.

Q. And to the conductors, engineers?

A. Mr. Small pays all of the bills. I do not want—

Q. My inquiry is if Mr. Small pays the station agents, you say he does?

A. He pays the station agents through the paymaster.

Q. Who is the paymaster?

A. H. W. Greely.

Q. Is not Mr. Greely the accountant?

A. Yes.

Q. Then Mr. Greely does personally by the direction of Mr. Small actually pay the station agents?

A. Yes.

Q. Does he visit their stations for that purpose or do they come to his office?

A. Partly both.

Q. So that he sometimes goes to their stations to pay them and they sometimes come to his office?

A. Yes. And sometimes the pay-roll is sent there, just as may be convenient; when he is there overlooking their accounts, he would do what business he had at that time.

Q. Where is the freight kept that is received at Oakland to be forwarded away? What buildings is it kept in?

A. It is kept in the Maine Central station and in the yards and in the cars. A very large portion of it does not go into the station-house at all.

Q. You mean it remains on the cars from the Somerset road until it is transferred to the Maine Central cars?

A. Yes; usually the same cars go through that are loaded.

Q. And it is usually done the other way?

A. Very largely, yes.

Q. Do you simply transfer the freight from one car to the other?

A. Take the same car through usually.

211 Q. The Maine Central car brings you some freight and you take it right through to the station, whether Anson or Bangor?

A. Yes, if there is a reasonable amount in the car.

Q. And the same coming back?

A. Yes.

Q. What business is done by Mr. Burrill at Oakland in the Maine Central depot aside from selling tickets to passengers?

A. He deals with local freight and sees to the transfer.

Q. What?

A. You transfer a car as well as a single piece of freight; a receipt is kept and the seals of the car and the condition.

Q. Does Mr. Burrill have any duties to perform that take him into the Union Edge Tool Company's building where the other offices

are?

A. Nothing special.

Q. He goes there if he wants information or instruction?

A. Yes.

Q. What other buildings belonging to the company are there at Oakland?

A. Other repair shops are there.

Q. Are the car shops within or without the location?

A. They are without the location.

Q. Does the company own the land?

A. Yes.

Q. What are the sizes of these shops at Oakland? How many different buildings are there?

A. Seven or eight.

Q. All on the land that the company owns?

A. Yes.

Q. Give us the sizes of them, as near as you can.

A. The main shop is 150 ft. long, 36 ft. wide; the paint shop is 144 ft. long, 24 wide, I think; the blacksmith's shop is 30 x 40; the oil-room is 20 x 30; the store-room No. 1 is about 25 x 30, I think; the lumber shed is 50 x 20; coal shed is about 230 ft. x 26, I think; storehouse No. 2 about 30 x 15; the engine-house is 65 x 30 say—that is I average the width; the water tank is 16 x 32; section-house 12 x 15. That is all.

212 Q. Does Mr. Small, the treasurer, pay to the Maine Central anything for the rent of the room used by Mr. Burrill?

A. No, sir.

Q. The two roads connect at Oakland?

A. Yes.

Q. The principal use that he makes of the Maine Central depot is for the purpose of selling tickets?

A. Yes, and billing freight.

Q. Now in relation to the North Anson depot, if I understood you, John Ayer, your father, owns the land upon which a part of the building sets?

A. Yes.

Q. Has the company a lease or deed from him?

A. I am unable to say.

Q. At Madison, has the company a lease or a deed or some right?

A. They have a lease.

Q. From the citizens who own it?

A. Yes.

Q. Who are the principal men who own the land upon which part of the station building sets?

A. Mr. Weston, D. P. J., Mr. Nathan Wood—

Q. Mr. Weston is one of the directors in the company?

A. Yes, Mr. Town, and I am unable to name the rest of them.

Q. Are there any other directors in the company there except Mr. Weston?

A. No, sir.

Q. And he lives at Madison?

A. Yes.

Q. He is a trader there?

A. Yes.

Q. And part owner of this land that the station sets on?

A. I presume he is, I think that he is.

Q. Does not Mr. Weston own the land?

A. No, sir, I think not.

Q. They have some lease as I understand?

A. Yes.

213 Q. Was not it purchased by Mr. Weston and these other gentlemen for the purpose of having a station built there?

A. I am unable to say about that.

Q. Do not you understand it so? Have not you always understood it so?

A. The station was located there by the railroad commissioners and a town way was laid down in through there at about that time, and whether this strip of land is part of the highway or owned by the gentlemen he mentions, I am unable to state.

Redirect:

Q. Referring to Major Small, do you mean Major A. R. Small, who is the acting treasurer of the Somerset railway?

A. Yes.

Q. Whether the payments made by Major Small, to which you testified to, are payments of the current and fixed liabilities of the railroad company as made by him, in his capacity as treasurer of the railway?

A. Yes.

Q. Whether or not, the Somerset railway leases offices for all of its officers in one building in Oakland?

A. Yes sir.

Q. How far is that building located from the location of the Somerset railway or of the old Somerset Railroad Company?

A. 60 rods I should say.

Recross:

Q. Whether Mr. Small is not an officer or connected with the Dunn Edge Tool Company?

A. Is book-keeper for the Dunn Edge Tool Company.

Q. And how long has he been?

A. I should say twenty years or more.

Q. Has he been connected as book-keeper or in other ways besides book-keeper with the Dunn Edge Tool Co. that you know of?

A. No sir.

214 Q. Then he has been connected with the Dunn Edge Tool Co. ever since the organization of the original Somerset Railroad Company so far as you know?

A. Yes.

Q. And from that time down to the present?

A. Yes.

Q. What is the amount of rent paid yearly to the Dunn Edge Tool Co. for these buildings that you have spoken of, these offices?

A. \$50 a year.

Q. When were these buildings erected, the car shops and repair shops, at Oakland? What year or years?

A. They have been erected as required from year to year.

Q. Between what years?

A. The hand-car house was erected, I think, when the road was organized—20 years ago I should say; the water tank was 15 years ago; the engine-house 12; the repair shops, that is the main shops and the rest of the buildings six years ago.

Q. When was the station building erected at Norridgewock?

A. About '73 or '4.

Q. When was the station erected at Madison?

A. I think in '79.

Q. Erected before the road was done? The road was done to Anson in '76. Calling your attention to that, you may be able to state whether before or afterwards?

A. Afterwards. That station was established by the railroad commissioners there.

Q. When was the station at Anson erected?

A. The winter of '75-'76.

Q. And the one at North Anson?

A. I thought you spoke of that one. There is no station at Anson, it is a store.

Q. A store used as a station building?

A. Yes.

Q. This store is not owned by the company?

A. No sir.

Q. None of it?

A. No sir.

215 Q. Is it rented by the company?

A. No, sir.

Q. No rent paid for it?

A. No, sir, that is no direct. The salary of the agent covers the use of the building and his services.

Q. The station building at North Anson was erected when?

A. The winter of '75-'76.

Q. The station at Embden?

A. At the completion of the extension there in '89, I think.

Q. The station building at Solon was erected in what year?

A. '90.

Q. And at Bingham?

A. '91.

Q. There is no station between?

A. No, sir.

Q. I believe I understood you that the station at Bingham stood partly outside of the location—that is correct?

A. Yes.

Q. Who owns the land there?

A. The company own it.

Q. And the building of course?

A. Yes.

JOHN AYER.

WATERVILLE, Dec. 6th, 1893.

The foregoing is a true copy of my notes in the case.

HELEN REDDINGTON,
Deposition and Disclosure Commissioner.

216

(Defense.)

Counsel for defendants offers in evidence stenographer's report of the testimony of Alonzo Garcelon in the case of Inhabitants of Anson *et als.*, petitioners for appointment of trustees, in Kennebec county, as follows:

ALONZO GARCELON, called by the petitioners, testified:

I acquired all the bonds in question, that I hold, within a year, and bought them in the market as commercial paper, and paid value for them.

Cross-examination:

I bought them of William Atkinson, and paid him for them at the rate of seventy to seventy-five dollars per hundred.

Redirect:

I have no knowledge of their having been S. S. Thompson's bonds.

Cross-examination :

I have an impression that I was told that Thompson's administrator had bonds that I could buy, and I think Atkinson told me. Other parties, however, have given me intimation in regard to some of the bonds that I have. Some of them I paid par for. I cannot state precisely when I bought any at par, but within six months I bought some for that and paid for them in money. Did not pay it to Mr. Atkinson. The money was paid into the National bank at Lewiston.

Direct :

Did not buy all my bonds of Atkinson. I paid par for some of these bonds, and paid through the bank. Don't remember exactly how many of them I got at par, but quite a number. I bought some of a party in Skowhegan, I don't recollect his name; he had some interest in the bonds in some way.

217 Counsel for defendants also offers in evidence stenographer's report of the testimony of John M. Robbins, as follows:

JOHN M. ROBBINS, called by the petitioners, testified :

Think I own ten five hundred dollars of these bonds. The amount of bonds I hold, as stated in the petitions is correct. For the first lot of them that I bought I paid seventy cents on a dollar, and bought of William Atkinson. I bought some of E. C. Whiting, I think. Could not tell now how many I bought of him, or how many of Atkinson. I had a thousand dollars of them of C. I. Barker. I also had some of T. R. Herbest, and they came from George Wing, I think. I believe I had but one bond of him. I paid an even dollar for as much as five thousand dollars' worth of them, for some of the others I paid seventy dollars, and quite a number seventy-five dollars. Seventy is the lowest I have bought any for. I bought these bonds in the market as commercial paper; I so understood them to be.

Cross-examination :

Don't mean to say I paid par for the bonds and then dollar for dollar for the accrued interest. Should say the accrued interest would equal the face of the bond.

Q. That would make the bond about fifty cents on the dollar?

A. Well, if you take it in that way. I acquired the title to all these bonds within a year. Think this matter of buying these bonds was first brought to my attention by William Atkinson, and then I wrote to Wesley Dunn, asking him what those bonds were worth, and he wrote me what he would give for the bonds, "but," he says, "I should want a larger price for my own." He said he had some.

Q. Did Mr. Atkinson tell you that the administrator of the estate

of S. S. Thompson had some to sell, and that he wanted you to take part of them?

A. I don't think he put it in just that way. He said he knew of a block of bonds he could buy in Boston.

Q. Did he tell you that they belonged to the estate of Thompson?

218 A. I won't say that he ever told me, but before we got through I understood that some of them did come from his estate. I could not tell how many I bought of Atkinson. What was held by the bank would be about four thousand five hundred dollars apiece. Atkinson has brought along occasionally five, seven and twelve hundred of bonds at a time.

Q. You say there were four thousand five hundred dollars apiece. Who was the other party?

A. Dr. Garcelon, Mr. Herbest and Mr. Barker. To tell it just as it was, that is what was put into the savings bank as collateral, and the money drawn on that account. We had more bonds than that, which I think came from the Boston block.

Q. What was the amount of bonds that you afterwards found belonged to the estate of Thompson?

A. I should say somewhere in the neighborhood of twenty-eight thousand dollars. That included the principal only. I should say there was about the same amount of accrued unpaid interest.

Q. Did you and the gentlemen whom you have named form a syndicate to buy these bonds in, and have Atkinson go and get them?

A. No, there was no syndicate on my part. We agreed to take them. I agreed to take so many of him. I have got more than my part of them.

Q. Was there an agreement between you and Gov. Garcelon and the other gentlemen you have named to divide up the bonds?

A. No, I don't think there was.

Q. Did you ever agree to take more or less of them?

A. I told them I would take what they did not want to take.

Q. Haven't you agreed to take what belonged to the estate of Thompson?

A. No, I don't think that thing was agreed; I don't think there was any agreement about it.

Q. Are these bonds now held by the Lewiston savings bank?

219 A. The Peoples' savings bank have eighteen thousand dollars of those bonds in there as collateral to a note signed by myself and the other gentlemen I have named.

Q. When you bought these were you informed, or had you heard that the Somerset Railroad Company which had issued these bonds had gone out of existence, or pretended to go out, and that a new corporation had been formed?

A. No, I don't think I was. I bought more on the strength of what Wesley Dunn told me.

Q. Did you understand there was a question of the legality of the present Somerset Railway organization when you bought these bonds?

A. I don't remember about that; I don't think I did.

Q. Didn't Atkinson tell you that if the new corporation could be broken up these bonds would be worth par and interest?

A. He has talked a good deal; I could not tell all he has talked.

Q. Can you tell that?

A. I should think very likely he stated that. He stated it since I bought the bonds.

Q. Will you swear he did not state it before you bought the bonds?

A. No. I understood when I bought these bonds, by the way of Dunn, that the bonds were worth about a dollar; he told me so in my house, and I put it down in writing. That refers to the bonds and coupons. He said the bond itself he considered worth fifty cents on the face of it, and he says, "These coupons are worth in proportion as much as the bonds." I have that in my diary book which is at home. That was within a year. I bought them on the strength of what Dunn said, not on the strength of what Atkinson said, because if the bonds were worth that, I was willing to give seventy cents for them.

Q. When you got these bonds were you aware that there had been a new corporation formed, and the old mortgage securing payment of these bonds had been foreclosed?

A. Yes, I think I knew that. I think I learned that from Dunn.

220 Q. Then what was your object in buying these bonds after you understood that the mortgage which secured them had been foreclosed?

A. Dunn said the road had improved, and that the road would make them worth that.

Q. Did he tell you that these bonds and the best of the class to which they belonged were convertible into the stock of the new company, the Somerset railway?

A. I think he said they had been converted; yes, I think that is what he said.

Q. Did you buy these with a view of converting them into the stock of the new corporation?

A. No, I did not.

Q. What object did you have in buying them?

A. I thought if they were worth a dollar it was a good investment.

Q. With a view of testing by process of law, the legality of the new organization, the Somerset railway?

A. I did not take into consideration anything about the law. I thought if they were worth that we would get it without law.

Q. How were you going to get it if the mortgage which had secured them had been foreclosed?

— If the coupons were worth as much as the face of the bonds, and they were worth fifty cents on a dollar, it would make them that even if you took it in stock. I have never applied to have stock delivered to me and have never surrendered my bonds to the company, the Somerset railway, and demanded stock. I don't

think I knew particularly when the new company was formed, but I have known of the road ever since it was built.

Redirect :

Q. At the time when you bought these bonds, didn't you understand that the old mortgage was in force, and the first lien on the road over everything?

A. That is what was told.

Q. Didn't you buy with that understanding?

A. Yes I did ; that is what I supposed.

221 Q. When you bought these bonds didn't you rely upon the mortgage under which they were secured, as the ground, really, of security for the bonds?

A. Yes, sir.

Q. Had that mortgage ever been paid, surrendered or affected in any way, so far as you knew?

A. Not so far as I knew.

Cross-examination :

Q. Who told you what you say you were informed as to the mortgage being in force?

A. I think Dr. Garcelon was the first man who told me. I could not tell when he told me that, but in 1890, and before I bought the bonds.

Q. Did he tell you that as an inducement for you to join him and others in purchasing them?

A. No, there was nothing said about purchasing at the time.

Q. Did anybody else besides Gov. Garcelon tell you that the old mortgage was the first lien?

A. I saw a letter written by an attorney that said the mortgage would hold. I think Gov. Garcelon showed me the letter.

Q. Did Atkinson tell you that the old mortgage was good and would hold, and was a first lien, or anything to that effect?

A. I think he has told that a good many times. I don't know whether I relied upon it or not. I have heard him state it.

Q. Did he tell you that before you bought the bonds?

A. No, I had bought some before he ever told me that, before I ever had any talk with him about this matter.

Q. Did Atkinson tell you that the old mortgage was good and was the first lien, or anything to that effect, before he went to Boston to buy of the estate?

A. I think he did.

Q. And did you understand then that the object was to attack the new organization, the Somerset railway?

A. No, not particularly. But I did not rely so much on that as I did on the letters I saw ; and I consulted some attorneys, and they said they considered the old mortgage good.

222 Direct :

Q. Were you not informed in some way, either by information from

attorneys, or otherwise, that what they set up as a foreclosure of that mortgage and under which the new company was formed was not valid?

A. I was.

Q. Whether or not you were informed in the same way that the new company, as against the old mortgage, was not valid?

A. Yes.

Q. That is to say, that they stood in a secondary position to the old mortgage?

A. Yes.

Counsel for the defendants also offers in evidence stenographer's report of the further testimony of Alonzo Garcelou, in the same case, as follows:

ALONZO GARCELON, recalled for cross-examination:

I made inquiries as to the validity of the old mortgage before I bought my bonds.

Q. And when you bought your bonds did you understand that there was a new organization called the Somerset railway managing the property of the old Somerset Railroad Company?

A. I will state my first information in regard to this matter. I was applied to to purchase two or three bonds belonging to some widow woman, as was alleged, or persons who wanted to raise the money on some bonds. Knowing that some friend in one of the Auburn banks was interested in some bonds of the road in some way, I went to make inquiries, and the directors of the bank referred me to their attorney, John A. Morrill, and he informed me that they had bought certain bonds of the road of the new company as it was then said. I won't be certain whether he showed me the annual report of the company or not, but at any rate, he said the bonds had been taken by their bank, but they had been taken with a guaranty on the part of the persons selling them that they should be paid; that they did not consider those bonds
223 as binding, or at least that they did not regard them as good for anything without.

Q. Did he tell you the bank had ten thousand of the new bonds?

A. Yes, and that they were taken with a guaranty of the parties of whom they made the purchase. That is my first knowledge of this matter, and I think that was some time early in the summer of 1890. Gradually I made further inquiries in regard to it from other sources, and the result was that I had firm belief that the first mortgage was binding and was valid as to all bonds that had not been converted to the road.

Q. Then from your investigation you believe that the mortgage which secured the bonds which you now hold was binding and a valid lien?

A. Yes, sir.

Q. And at the same time you understood there had been a pretended new corporation which had issued new bonds, such as were held by the savings bank at Auburn?

A. Precisely, under an act of the legislature which had under-

taken to set aside the contract between the original bondholders and the road.

Q. In other words, you were fully aware that new bonds had been issued, but you did not believe the issue of the new bonds was valid against the old bonds?

A. Precisely.

Counsel for defendants also offers stenographer's report of the testimony of William Atkinson, in the same case, as follows:

WILLIAM ATKINSON, called by the petitioners, testified:

I own \$5,500 of the bonds of the old Somerset Railroad Company, which I bought of Mr. McCall of Boston, administrator of the estate of S. S. Thompson. I agreed to pay fifty-five cents on a dollar for them, and did. That was on the original bonds. The coupons were thrown in. I bought these bonds in the city of Boston just as I bought others round the country.

Q. Whether you bought these bonds as commercial paper in the market.

(Objected to and admitted.)

224 A. I did. I bought bonds at Norridgewock, at Anson, Auburn and all over the country, in various places, and had agents to buy for me, too. Some of the \$5,500 of bonds here came from Boston and some did not. I bought \$1,100 of them in Phillips, of a widow woman, and some of E. C. Whiting. At another time I bought \$400 of him, and at one time I bought some of Henry Murphy, of Norridgewock. I bought some in other places, but who owned them I don't know. Those I bought in Phillips were owned by a widow woman. I cannot exactly tell how many of those \$5,500 of bonds are of the Boston bonds, but a majority of them. I paid fifty-five cents on a dollar for the Boston bonds. I bought \$400 of the widow in Phillips, for forty cents, and the next morning I bought of her \$700 for fifty. Every bond that I bought, I bought in the market the same as I would buy a note or anything of the kind.

Cross-examination:

I reside at North Anson. That has been my post-office address for about fifty-seven years. I had something to do with the Somerset Railroad Company in its infancy, and was a stockholder in it. Was not an original bondholder. I was a director of the corporation for a good many years. I was a director until a year or two before they undertook to organize and change the company over into the Somerset Railway Company, and Uncle Dunn couldn't make a tool of me and turn me out. I would not be made a tool of by them. I told them I never would serve again as long as certain men were elected, and they left me off. I did not in any way participate in the formation of the Somerset railway.

Q. Were you cognizant of the fact at the time by rumor, or from what you heard from the directors or bondholders, that the bond-

holders of the old Somerset Railroad Company had foreclosed the mortgage?

A. No. I heard they undertook to, but knew they never had.

Q. What did you hear about their undertaking to?

225 A. I guess several called my attention to the fact that Uncle Dunn and others had got a bill through the legislature providing that the bondholders of a railroad, such as the Somerset railroad, that hadn't paid the interest on its bonds for three years or more, might get together—not a third part, but a majority—and put their bonds into stock, convert their bonds into stock and go ahead and do certain other things under the name of a new corporation. I could not give the date when I heard that, but about 1883.

Q. Did you hear they had also sold the equity of redemption of the Somerset Railroad Company at auction?

A. Dunn told me they had, but I knew they hadn't.

Q. Was that before you bought these bonds which you now describe in your petition?

A. A long time. The bonds described in my petition I bought about last June. I went up I guess in May, and partly bargained for them and talked it over a little. By "Uncle Dunn" I mean Reuben B. Dunn. Dunn told me what they had offered for them. They had got them down pretty well. They bought them for twenty-five and thirty cents on a dollar. I knew that they were to all intents and purposes first-mortgage bonds on the road, and I thought it would be a good time to buy at the price they had set on them if I could. I thought it was a good investment. I bought twenty-eight thousand eight hundred dollars of bonds of the administrator of the Thompson estate. I did not figure up the coupons. I have my bonds here. Those bonds I bought in Boston I delivered to the express agent, directed to a bank in Lewiston. I think the People's savings bank, or the First National bank. I got the bonds insured for twenty thousand dollars. I think I directed them to the Manufacturers' National bank. It is barely possible I directed them to some individual, but I think to one of those banks. I took the number of every bond I bought of the Thompson estate. I was not afraid to pool in on that purchase, because I knew the bonds were perfectly safe. I know it now. I believed it and know it. I believed it.

Q. When you bought these bonds you knew there had
226 been a corporation or pretended corporation organized, called the Somerset railway?

A. I knew that was the talk.

Q. And you knew that the new corporation had issued bonds and mortgaged the road?

A. I had understood so. I never saw one of the bonds. I have no doubt they did. I understood they were going to issue, and did issue, \$225,000 of bonds, and called them a first-mortgage bond, and sold them for that. I don't know what they did with the proceeds. It was the talk that they were to issue the bonds and sell them and get money to build the extension from Carratunk and Solon up to

Bingham village. I understood it the same as you (Mr. Webb) did or anybody else. I was not a director and had nothing to do with it. I don't know anything about whether the old Somerset Railroad Company was solvent when I left the management as a director. I was a director of the road. I never had anything to do with the funds of the road. I presented my bill for my services, and presented it once to you (Mr. Webb) and tried to get my pay.

Q. Were not a good many bills presented against the old board that were not paid because there were no funds?

A. It was so said. I knew well Stephen D. Lindsey, of Norridge-wock, and did for forty years before he died. He was not a director of the old Somerset Railroad Company to my knowledge. He was a trustee under the mortgage made to secure the bonds, put there at my instance.

Q. Were you aware of the fact that Lindsey as a trustee favored the foreclosure of the mortgage which secured your bonds, and of turning the old Somerset railroad corporation over to the new?

A. No, I don't think there is a word of truth in it either. I will tell you why if you want me to. I knew William H. Brown, of North Anson. He is dead. I attended his funeral a year ago last October, I think.

Q. Was he a director in the old Somerset Railroad Company when you were?

227 A. He was ostensibly. He was elected at the same time I and the other directors were elected.

Q. What do you mean by ostensibly?

A. I mean apparently. Although he was elected, he never amounted to a pinch of snuff. They were tools of Nathan Weston and Frank Hill. William H. Brown, was a bondholder under the old mortgage.

Q. Do you know whether or not he participated in foreclosing the old company and organizing the new?

A. I don't. Gov. Garcelon had some of the bonds that I bought of the estate of S. S. Thompson. C. I. Barker, J. M. Robbins and T. R. Herbest, also had some of them. The bonds I got there were distributed to the gentlemen I have named. None of them went to T. H. Spaulding, James Fellows, B. S. Collins or Henry Ingalls. The gentlemen I have named had every single bond of the twenty-eight thousand dollars I bought in Boston. The bonds Mary Carney held were owned by her husband who died and left them to her. That is common report. I have no knowledge of it.

Redirect :

Q. Now whether when you bought these bonds of the Thompson administrator you had any knowledge or notice of any sort of the way that Thompson's bonds were used in the formation of the new company, if they were used?

A. Not at all. The first intimation I had of it was a letter you (Mr. Stewart) wrote to me as to what Mr. Webb told you, and I went down to Skowhegan and met you on it. Could not tell where Ingalls' bonds came from. I sold them to him, picking them up.

Counsel for defendant also offers in evidence stenographer's report of the testimony of T. R. Herbst in the same case, as follows:

T. R. HERBST, called by the petitioners, testified:

I have \$6,900 of these bonds in question I believe. I bought some after I signed the first petition. I bought them in the 228 fall of 1890. The bonds referred to in the first petition, \$6,000, I bought of William Atkinson, and paid him 70 in cash for them.

Q. Now at the time when you bought these bonds and paid for them as you have stated, did you pay, according to the best information and belief you had, the market value of the bonds, as you understood them at the time?

A. Yes, sir.

Q. Whether you had any knowledge that any of the bonds you hold, whatever they may be, had ever been used in any way in the formation of what is called the new company?

A. No sir.

Q. Whether or not you bought the bonds in the market the same as you would any other commercial paper?

A. Exactly the same.

Q. And paid what you understood to be the fair market value of them?

A. Yes, sir. The \$1,100 mentioned in one of the petitions, I had from fifteen parties, and paid for them all the way from \$75 to \$105, I believe. \$105 is the highest I believe. I bought those bonds in the market as commercial paper. I paid at that time just what I supposed they were worth in the market.

Cross-examination:

I purchased the bonds last fall. Think Dr. Garcelon, Mr. Robins and C. I. Barker, purchased at about the same time. Think we all took very near equal amounts. I signed the note with the rest and put my bonds into the bank, and they are held by the bank as collateral. I have a few of them there. They are in the Manufacturers' National bank. I put them in as collateral at the same time I bought them of Atkinson. Think Atkinson did not tell me they were the bonds that came from the estate of S. S. Thompson, I did not know where they came from at the time. It was a matter that I did not think much of. The prices I paid were for the bonds with the interest thrown in. I did not really understand about the coupons. They had not been paid and I saw they had been defaulted, and I thought likely they would be paid further on.

229 Q. When you say they had been defaulted—what inquiries did you make in relation to the value of the bonds?

A. I supposed that they would be paid finally.

Q. Who informed you so?

A. I was told so by several different parties. Think Dr. Garcelon told me about it for one. Don't remember who the other parties were that told me. Think Atkinson told me they would be paid.

Q. Didn't it excite your suspicion to find the great number of coupons on those bonds that had gone to default?

A. I had seen such things before, and I thought likely they would be paid after a while. I made no investigation to see the probabilities of payment.

Q. Then what made you think they would be paid?

A. I had an idea that a road starting new never paid in the first place, but did after a while, the same as the Maine Central did.

Q. Had you been informed that the bondholders had foreclosed this old mortgage?

Q. No, I knew nothing of it.

Q. Did you make any inquiries as to whether any foreclosure had transpired?

A. I don't remember that I made any.

Q. Were you informed, or had you heard, or did you know of the new corporation being in control of this same property?

A. I heard that they had a reorganization and a foreclosure, after I bought my bonds. I did not hear a word of it before. I made no inquiries in that respect when I bought. I took them as commercial paper on the market, the same as everything else that is floating paper on the market.

Q. When you see overdue bonds and a long string of coupons gone to default, do you buy them without asking any questions?

A. I do sometimes. I have bought that way.

Q. And you paid, the same as you have stated here, without making any inquiries and having a full knowledge that they had gone to default?

A. No, I had no full knowledge of it.

230 Q. Did you have any knowledge?

A. Only hearsay. I saw the coupons hadn't been paid, but they will be finally paid, the same as the Maine Central. I call this just the same as buying commercial paper "in the market."

Counsel for the defendants put in evidence certificate of stock No. 79 for eight hundred shares, running to the town of Anson, dated at West Waterville, July 31st, 1878.

Counsel for the defendants also put in evidence the following statement of the numbers and amounts of bonds held by the town of Anson:

"Numbers 198, \$500; 200, \$500; 82, \$500; 83, \$500; 84, \$500; 85, \$500; 86, \$500; 87, \$500; 88, \$500; 165, \$500; 166, \$500; 167, \$500; 168, \$500; 169, \$500; 170, \$500; 171, \$500; 173, \$500; 181, \$500; 182, \$500; 183, \$500; 184, \$500; 185, \$500; 186, \$500; 187, \$500; 188, \$500; 190, \$500; 192, \$500; 193, \$500; 197, \$500; 195, \$500; 196, \$500; 194, \$500; 5, \$500; 334, \$100; 335, \$100; 336, \$100; 337, \$100; 400, \$100; 401, \$100; 402, \$100; 404, \$100; 409, \$100; 407, \$100; 406, \$100; 405, \$100; 403, \$100; 408, \$100; 333, \$100; 207, \$1,000; 204, \$1,000; 202, \$1,000; 203, \$1,000; 139, \$1,000; 138, \$1,000; 201, \$1,000; 205, \$1,000; 206, \$1,000. Total, \$27,000.

Counsel for the defendants also put in evidence stenographer's

report of the further testimony of J. M. Robbins, in the same case before referred to, as follows:

J. M. ROBBINS, recalled by the petitioners :

Q. At the time you purchased these bonds, or any one of them, whether you had any knowledge or information of any sort, or notice of any kind, that any bonds that you purchased were used in the formation or organization of this new company, as they claim it?

A. No sir, I did not. I never heard anything of the kind until some time this winter, since the bonds were bought.

231 Cross-examination :

Q. What do you mean to say, that you have heard this claimed since the bonds were bought?

A. Mr. Stewart wrote me I should think not much more than two months ago. Mr. Stewart wrote me that you, (Mr. Webb) claimed that these bonds had been used in some way, the bonds that came from the Thompson estate. I knew that there was a question about these bonds when I bought them.

Q. Did you know when you bought them that the coupons were due and unpaid, and had been for a long time?

A. Yes, but I did not know that they had gone to default.

Q. Doesn't that mean default?

A. No, because there are a good many coupons that I have had that were afterwards paid.

Q. When coupons remain unpaid for eight or ten years don't you regard the bond as going to default?

A. I do not so regard it.

Q. Had you heard that a new corporation called the Somerset railway, had been organized?

A. When I bought them I had heard but very little about it. I knew a company had been formed, but I understood the old bonds would hold.

Q. How hold, because of the illegality of the new corporation?

A. I suppose so. I was so informed. Wesley Dunn did not tell me so. I think Mr. Atkinson told me so. I think Mr. Stewart's letter so stated. That was before I bought. I bought them since the litigation was commenced last July. I bought some in the fall. Think the first I bought I got of Dr. Garcelon.

Counsel for defendants also offers stenographer's report of the testimony of T. F. Paine in the same case, as follows:

T. F. PAINE, called by the petitioners, testified :

I am chairman of the board of selectmen of Anson, and also the town clerk. Should say the town of Anson had owned these bonds from eighteen to nineteen years. I was first, one of the selectmen four years ago this last spring. I found these bonds among the assets of the town when I became one of the selectmen. As a citizen of the town I have had a knowledge of that

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for years before. It was about the time the cars first came into North Anson, over the Somerset road, that the town first acquired the bonds.

Cross-examination:

I resided in Anson in 1883. Think Edwin Collins and W. W. Pease, acted as selectmen that year.

Q. Were there several town meetings held in the town of Anson, in relation to what course the town should adopt in relation to these bonds?

A. Not that I am aware of; I don't recollect particularly that year.

Q. Were you aware that in 1883, some of the bondholders of the Somerset Railroad Company, took steps to foreclose the mortgage which secured the bonds which you present as belonging to the town of Anson?

A. I heard such talk, what I supposed to be the case.

Q. Were you aware that Edwin Collins and W. W. Pease, as selectmen of the town of Anson, filed a petition with others representing themselves to own more than one-half of the bonds, and requesting and electing to form a new corporation?

A. No, sir.

Q. And were you aware that the inhabitants of the town of Anson had a public meeting and voted upon the subject to instruct its selectmen?

A. I cannot say; but then I have been aware that there have been some town meetings called in relation to the bonds; but I cannot say what year.

Q. Were you aware that the bonds which now belong to Anson, participated in the formation of a new corporation called the Somerset railway?

A. No, sir, I have been selectman three years, four years ago last year and this year.

Q. Do you remember whether in 1883 Edwin Collins and W. W. Pease were selectmen of the town?

233 A. I presume they were.

Q. Don't you remember that the town instructed them to join with other bondholders in forming a new corporation?

A. No sir. The name of the newspaper at Anson, is the Union Advocate. Albert Moore & Sons, publish it. Albert Moore is here present.

Q. Do you know whether Albert Moore participated in the formation of the new corporation called the Somerset railway?

A. I don't know that he ever did.

Q. Do you know whether or not any petition purporting to be signed by the bondholders of the Somerset Railroad Company, including the inhabitants of the town of Anson, was published in the newspaper called the Anson Advocate, and edited by Albert Moore?

A. I was not aware of it.

Counsel for defendants also puts in evidence the bill in equity for appointment of trustees under mortgage of Somerset Railroad Company, order of notice, petitions in aid of the same, and acknowledgment of service, as follows :

To the honorable justices of the supreme judicial court for and within the county of Kennebec, sitting in equity :

Respectfully complain and represent, the inhabitants of the town of Anson, in the county of Somerset, by their selectmen and financial agents, and Brown and Hilton, and Wm. H. Moore, citizens and inhabitants of the town of Anson, aforesaid in said county of Somerset, that the Somerset Railroad Company, a corporation duly established by law and having a place of business at West Waterville in the county of Kennebec, now Oakland in said county, its road-bed and track extending into both Kennebec and Somerset counties, on the first day of July, A. D. 1871, by its mortgage deed of that date duly executed and recorded in both counties, conveyed to Lewis Pierce of Portland in the county of Cumberland, Daniel Holland of Lewiston in the county of Androscoggin, and Stephen

234 D. Lindsey of Norridgewock in the county of Somerset, in trust and in mortgage, and to the survivor of them, and to their successors, in joint tenancy, its railroad and franchise, and all its real estate and all its personal property of every nature used in connection with said railroad, together with all its fixtures, and all its rolling stock, then in possession, or to be thereafter acquired. To have and to hold said premises in trust for the holders of the bonds of said Somerset Railroad Company to be issued by it to an amount not exceeding in the whole the sum of five hundred thousand dollars payable in twenty years from the first day of July, A. D. 1871 with interest at the rate of seven per cent. per annum payable semi-annually in Boston, and at the treasurer's office of said company in gold, according to the coupons annexed to each bond, and to secure the payment of said bonds and coupons to the holders thereof as they should become due according to the tenor thereof.

And your orators further show that said company on said July 1, 1871, made and issued its bonds secured by said mortgage to the amount of four hundred and fifty thousand dollars, with proper coupons for interest thereto attached at the rate of seven per cent., payable semi-annually on the first day of January and of July for twenty years thereafter, the principal sum of said bonds to become payable on July 1, A. D. 1891, and not yet due; and said bonds and coupons were put upon the market by said company and about three hundred thousand dollars of same were duly sold to many persons and parties, and the proceeds thereof were applied to the building and construction of said railroad, the payment of damages for its road-bed, depots, and stations, and the erection of the same, and for suitable rolling stock for the operation of said road; and said railroad was duly opened to the public and commenced running from West Waterville aforesaid in said county of Kennebec through the towns of Fairfield, Norridgewock, Madison and to Anson village, in the county of Somerset on or about January, A. D. 1876,

and has since been extended to Solon in said county ; between which last-named town and West Waterville, now called Oakland, the cars of said company run daily, connecting with the Maine Central railroad at said Oakland.

235 And your orators further show that said inhabitants of said Anson, in their corporate capacity, subscribed and paid for and are the owners of stock in said Somerset Railroad Company to the amount of eighty thousand dollars; and that they are also the purchasers and owners of the bonds of said company issued under the mortgage aforesaid to the amount of twenty-seven thousand five hundred dollars; that said Brown and Hilton are the purchasers and owners of three thousand dollars of said bonds, and said William H. Moore is the purchaser and owner of three hundred dollars of said bonds; all of such bonds with the coupons attached having been purchased and paid for by your orators soon after the issue of the same by said Somerset Railroad Company in 1871, and the purchase-money received by said company from your orators was applied and used in the construction and furnishing of said railroad, by said Somerset Railroad Company.

And your orators further show that a portion of the interest upon said bonds was paid as it fell due semi-annually to your orators and others for several years after the issue and purchase of said bonds; but that for the last twelve years no part of said interest has been paid; so that there is now due to said town of Anson upon the bonds and coupons of said Somerset Railroad Company fifty-five thousand dollars principal and interest; and to said Brown and Hilton, six thousand dollars principal and interest; and to said William H. Moore, six hundred dollars principal and interest; in all more than thirty thousand dollars of interest now overdue and unpaid on said bonds belonging to your said orators.

And your orators further show that said mortgage deed given by said Somerset Railroad Company to said Lewis Pierce, Daniel Holland and Stephen D. Lindsey as mortgagees and trustees as aforesaid, contain an express stipulation and condition that "any omission of said company to pay any of said bonds or coupons as they become due, shall constitute a breach of the condition of this deed;" and it was also further stipulated that "said company shall be entitled to the possession and management of said property until breach of the condition of this mortgage;" all of which will duly

236 appear upon inspection of said mortgage deed to said trustees, which, or a copy of which will be produced by your orators in this court.

Your orators further show that no provision is made in said mortgage deed for the appointment of new trustees in place of, and to succeed said Pierce, Holland and Lindsey, in case of the death or resignation of either; and they further show that since the execution of said mortgage deed, and the issue and purchase of said bonds as hereinbefore set forth, said Stephen D. Lindsey and said Daniel Holland have deceased, and no new trustees have been appointed as their successors.

Your orators, therefore, in behalf of themselves and others hold-

ing bonds and coupons of the same issue, respectfully pray that this court will appoint suitable persons as trustees under said mortgage deed in place of and as successors to said Stephen D. Lindsey and Daniel Holland, deceased, and pass such other orders as required by law in the premises.

Dated at Anson, July 2, 1890.

TOWN OF ANSON,
By T. F. PAINE,
E. H. BAILEY,
L. F. HOUGHTON,

Its Selectmen and Financial Agents Duly Authorized.

D. D. STEWART,
Solicitor for Complainants.

BROWN & HILTON.
W. H. MOORE.

STATE OF MAINE, }
County of Kennebec, } ss :

Supreme Judicial Court at Chambers.

JULY 14TH, 1890.

Ordered, sitting in equity, at Augusta, in said county—

That said petitioners give notice to all persons and corporations interested, of the pendency of this bill in equity and of the entry thereof in this court by publishing an attested copy thereof, and of this order of court thereon, two weeks successively in the 237 Kennebec Weekly Journal, a paper published in Augusta in the county of Kennebec, and in the Union Advocate, a paper published weekly in Anson in the county of Somerset, the last publication in both papers to be before the next rule day in said court, to wit, the first Tuesday in August next, being the fifth day of said month, that they may then appear and show cause, if any they have, why the prayer of said bill in equity should not be granted.

WM. P. WHITEHOUSE,
Justice Supreme Judicial Court.

Petitions in Aid of Above.

COUNTY OF KENNEBEC, ss :

Supreme Judicial Court, Sitting in Equity, at Chambers.

Town of Anson and other petitioners in equity for appointment of trustees under mortgage of Somerset Railroad Company of July 1st, 1871, to Lewis Pierce and *als.*, trustees, to secure holders of the bonds of said railroad company.

Petition in aid of the above.

The undersigned respectfully represent that they are holders and owners of the bonds of said Somerset Railroad Company secured under and by the foregoing mortgage, with the coupons thereon

for interest which remain unpaid for the last ten years and more. And they ask leave to come in as complainants under the foregoing petition of said Town of Anson and *als.*, and in aid thereof and to assist in prosecuting the same as parties thereto and pray that the prayers thereof may be granted and the vacancies therein set forth may be filled by the appointment of new trustees. They further show to said court that they are informed and believe that the original petitioners and themselves constitute a large majority and in fact nearly all of the outstanding bondholders under said mortgage, having subsisting and legal bonds issued by said Somerset

238 Railroad Company and secured under and by virtue of said mortgage on said railroad, its franchise, rolling stock, and real and personal property of every description.

The amount of bonds holden and owned by each petitioner is below set against his name, all of said bonds falling due July 1, 1891.

	Am't of bonds.	Am't of coupons.
Mary E. Carney.....	\$1,700	\$1,600
Nath'l G. Cutler, 3 bonds, Nos. 175, 176, 177..	1,500	1,527
Alonzo Garcelon ..	1,100	1,233 50
T. R. Herbest.....	1,100	1,233 50
C. I. Barker.....	200	224
J. M. Robbins.....	2,100	2,205 50
J. M. Robbins, trustee.....	3,200	3,563 00
C. I. Barker....	800	248

COUNTY OF KENNEBEC, ss :

Supreme Judicial Court, Sitting in Equity, at Chambers.

Town of Anson and *als.*, petitioners in equity for appointment of trustees under mortgage of Somerset Railroad Company of July 1, 1871, to Lewis Pierce and *als.*, trustees, to secure holders of the bonds of said railroad company.

Petition in aid of the above.

The undersigned respectfully represent that they are holders and owners of the bonds of said Somerset Railroad Company secured under and by the foregoing mortgage, with the coupons thereon for interest which remain unpaid for the last ten years and more, and they ask leave to come in as complainants under the foregoing petition of said Town of Anson and *als.*, and in aid thereof, and to assist in prosecuting the same as parties thereto, and pray that the prayers thereof may be granted, and the vacancies therein set forth may be filled by the appointment of new trustees. They further

show to said court that they are informed and believe that the original petitioners, and themselves, constitute a large majority, and in fact nearly all, of the outstanding bondholders under said mortgage, having subsisting and legal bonds issued by said Somerset Railroad Company and secured under and by virtue of said mortgage on said railroad, its franchise, rolling stock, and real and personal property of every description. The amount of bonds holden and owned by each petitioner is below set against his name, all of said bonds falling due July 1, 1891.

August 23, 1890.

	Am't of bonds.	Am't of coupons.
Alonzo Garcelon	\$6,700	\$7,973
C. I. Barker.....	5,900	7,031
J. M. Robbins.....	8,000	9,520
T. R. Herbest.....	6,000	7,140
Wm. Atkinson.....	5,500	6,545
T. H. Spaulding.....	700	833
James Fellows.....	500	525
Ben. S. Collins.....	1,300	1,547
Henry Ingalls.....	1,000	1,172 50

MARCH 7, 1891.

We hereby acknowledge service of the foregoing petition and hereby waive all other service.

SOMERSET RAILWAY,
By WEBB, JOHNSON & WEBB,
Its Attorneys.

Counsel for the defendants also put in evidence the demurrer and answers of the Somerset Railway and Edmund F. Webb and Everett R. Drummond, in said cause, as follows:

KENNEBEC, ss :

In the Supreme Judicial Court.

Inhabitants of the Town of Anson *et als.*, petitioners for the appointment of trustees under a certain deed of trust, in which the Somerset Railroad Company is grantor.

Demurrer and answer of the Somerset Railway, a corporation duly established by the laws of the State of Maine and having
240 an office at Oakland, in the county of Kennebec, said Somerset Railway being interested in the matters set forth in the complainants' bill in equity.

(Demurrer.)

Now comes the Somerset Railway, and say that the complainants are not entitled, upon their bill, for the relief prayed for, because the bill does not contain any matter in equity, whereon the court can ground any decree or give the complainants any relief against said Somerset Railway, and said Somerset Railway demur thereto.

And for cause of special demurrer, they show as follows:

First. Because Lewis Pierce, of Portland, in the county of Cumberland, one of the trustees and grantees named in the mortgage dated July first, A. D. 1871, given by the Somerset Railroad Company, to said Lewis Pierce, Daniel Holland and Stephen D. Lindsey, which the complainants have set forth in their said bill, and under which they claim the right to fill vacancies in said board of trustees, is not made a party to said bill, either as complainant or as respondent, nor are any reasons given why said Pierce is not so made a party, when he has important interests in said mortgage, or would have important interests if said mortgage was not *functus officio*, which it is.

Second. Because it does not appear by the complainants' said bill that said bondholders have elected new trustees to fill the vacancies stated in said bill, or that any meeting of said bondholders has been held for that purpose, as provided by the laws of the State of Maine.

And the defendants humbly pray the judgment of the court as to such parts of the complainants' bill as they have so demurred to, as aforesaid.

And we certify that in our opinion this demurrer is well founded in point of law.

WEBB, JOHNSON & WEBB.

241 And the undersigned, president of the Somerset railway, hereby certifies that this demurrer is not interposed for delay.

JOHN AYER,
President Somerset Railway.

KENNEBEC, ss :

AUGUST 25, A. D. 1890.

Personally appeared the above-named John Ayer, president of the Somerset railway, and made oath to the truth of the certificate by him signed.

Before me—

E. F. WEBB,
Justice of the Peace.

(Answer.)

And as to the residue of the said bill, the said Somerset Railway says:

It admits that the Somerset Railroad Company was a corporation duly organized, and that on the first day of July, A. D. 1871, it made and executed the mortgage deed to Lewis Pierce, Daniel Holland and Stephen D. Lindsey; and issued bonds to the amount of four hundred and fifty thousand dollars; and that said bonds were sold in the market; and that said railroad was open to the public, and that same has been extended and has made connections with the Maine Central Railroad Company, as averred in the complainants' bill.

Said Somerset Railway, further answering, says it has no knowledge that the complainants are owners of the capital stock of said Somerset Railroad Company, and of the bonds of said Somerset Railroad Company, as averred in the complainants' bill, and prays that the complainants may be required to make due proof thereof.

Said Somerset Railway, further answering, admits that no provision is made in said mortgage deed for the appointment of new trustees to fill vacancies occurring in the board of trustees; and it

further admits the death of said Daniel Holland and Stephen
242 D. Lindsey, and that no new trustees have been appointed as their successors, as averred in complainants' bill.

Said Somerset Railway, further answering, says it is informed and believes and it therefore avers that on the first day of April, A. D. 1883, said Somerset Railroad Company was insolvent, and it had been insolvent for a long time preceding that date, and was then unable to meet its indebtedness as it matured, and was threatened with legal proceedings by suits; and legal proceedings were then and long before pending against said Somerset Railroad Company, so that it was hindered and delayed in the performance and discharge of its duties, to an extent that rendered it practically impossible for said railroad to do its current business.

Said Somerset Railway, further answering, avers that said trustees named in said mortgage, or deed of trust, never took possession of the mortgage property; that the same remained in the possession of said Somerset Railroad Company, until the formation of a new corporation, entitled the Somerset railway, hereinafter more particularly described; and that said trustees never took any measures to secure a foreclosure of said mortgage for a breach of the condition thereof.

Said Somerset Railway, further answering, avers that on the first

day of —, A. D. 1883, there had been a breach of the conditions of said mortgage; that said bonds were then outstanding and unpaid, but not then due; that the interest on said bonds had been due and payable for more than three years prior to that time, and then remained due and unpaid; that the holders of said bonds, to an amount exceeding one-half of the same, elected in writing, to form a new corporation, as provided by the laws of this State; and that the holders of the bonds described in the complainants' bill, formed a new corporation, composed of the holders of said bonds, under the name of the Somerset railway, that said corporation was organized in the manner provided in chapter fifty-one of the Revised Statutes and acts additional thereto and amendatory thereof; that said Somerset railway adopted a code of by-laws and elected directors, and did all acts required to be done to complete said corporation; that the capital stock of said new corporation, called

243 the Somerset railway, was seven hundred and thirty-five thousand, two hundred and thirty-four dollars; and was made up as follows, viz., four hundred and fifty thousand outstanding bonds, secured by said mortgage, as principal, and two hundred and eighty-five thousand, two hundred and thirty-four dollars as interest upon said bonds, and due August 15th, A. D. 1883, and then unpaid, and that said capital stock was based upon the foregoing figures, as of August 15th, A. D. 1883.

Said Somerset Railway, further answering, avers that the complainants in their bill in equity, on the 11th day of July, A. D. 1883, petitioned or signed a call, with other holders of said bonds, to an amount exceeding more than one-half of the same, requesting that due notice be given of a meeting of the holders of said bonds for the purpose of forming such new corporation, so composed of said holders, and that such meeting was held, and that the bonds described in the complainants' bill were represented by the complainants at such meeting, and that at said meeting the holders of said bonds voted for the formation of such new corporation; and that at said meeting three hundred and fifty-one thousand nine hundred dollars, in par value, in amount of the bonds described in the complainants' bill, were represented in the call for said meeting, and that the whole amount of bonds then outstanding was four hundred and fifty thousand dollars; and that at said meeting said bondholders organized said new corporation, as provided by law, under the name of said Somerset railway, namely, on the — day of —, A. D. 1883, and that William H. Brown, of the firm of said Brown & Hilton, one of the complainants, was elected a member of said board of directors of said Somerset railway, and accepted said office, and was successively elected as such director and accepted such elections, until the time of his decease in November, A. D. 1889.

Said Somerset Railway, further answering, avers that on the first day of September, A. D. 1883, said Somerset railway, under its organization, as aforesaid, took possession of the railroad and other mortgaged property embraced in said mortgage, dated July 244 1st, A. D. 1871, and thereafter operated said railroad for the

benefit of this corporation, viz., the Somerset railway, and has continued to so operate said railway to this date.

Said Somerset Railway, further answering, avers that a majority of the bondholders of said Somerset Railroad Company converted their bonds into the stock of the new company, viz., the Somerset railway, and that said bonds of said Somerset Railroad Company were delivered up to said Somerset railway and cancelled, and the said Somerset railway issued to the holders of such bonds, shares in the capital stock of said Somerset railway, in lieu of the bonds so surrendered and cancelled; and that the same so remains to this day; and that the complainants in said bill agreed to surrender the bonds described in their said bill to said Somerset railway and to take in lieu of said bonds, certificates of the capital stock of said Somerset railway, as provided by law.

Said Somerset Railway, further answering, avers that at a meeting of its stockholders, held at Oakland, on the 22d day of June, A. D. 1887, and at a meeting of the directors of said company, held at Oakland, on the first day of October, A. D. 1887, said Somerset railway was authorized to issue its bonds to the amount of two hundred and twenty-five thousand dollars, said bonds payable in thirty years from the first day of July, A. D. 1887, with interest, that, for the purpose of securing said bonds and the coupons thereon, said Somerset railway conveyed in mortgage, and in trust, to Joseph R. Bodwell, then in full life, but since deceased, Edmund F. Webb and Everett R. Drummond, and their successors in joint tenancy, the railroad of said Somerset railway, from its junction with the Maine Central railroad in said Oakland, to its terminus in Bingham, together with all the franchise of said company, and its real estate and personal property; and that said Somerset railway issued bonds to the amount of two hundred and twenty-five thousand dollars, which were sold upon the market, and are generally held by savings banks in the State of Maine; and that said trustees accepted the trust, as stipulated in said deed of trust, and have continued to exercise the duties of said office from thence to this date.

Said Somerset Railway craves to make said deed of trust from said Somerset railway to said Joseph R. Bodwell *et als.*, a part of
245 this answer, and craves the privilege to file a copy thereof with the same effect as if it were recited herein at length.

Said Somerset Railway, further answering, avers that it sold said two hundred and twenty-five thousands in bonds, and that it used the proceeds thereof in constructing an extension of its road, under its charter, from the village of North Anson to Bingham, and that said extension has been constructed and is now open to the public, and in full operation by said Somerset railway.

Said Somerset Railway, further answering, avers that the mortgage described in the complainants' bill has become *functus officio* and is invalid and that no valid appointment of trustees can be made under it, and that it has ceased to be security for said bonds; and that the purpose of the complainants is to have trustees appointed for the purpose of taking possession of the road and franchise now in possession of said Somerset railway; and said Som-

set Railway avers that such conduct on the part of such trustees would destroy the value of the bonds issued by said Somerset railway, and that said trustees, so prayed to be appointed, would claim possession of said railroad which is now in the possession of said Somerset Railway.

Said Somerset Railway, further answering, avers that said mortgage, given to secure the bonds upon which the Somerset Railroad Company was formed, dated July first, A. D. 1871, was foreclosed by a decree of the supreme judicial court in the county of Kennebec, as provided by law, the final decree therein being made April first, A. D. 1887; and that said judgment of foreclosure has never been reversed, or annulled, but remains in full force.

Said Somerset Railway, further answering, avers that on the eighth day of July, A. D. 1884, it purchased all the right in equity which said Somerset Railroad Company, or any parties claiming under it, had, of redeeming said mortgaged property from said mortgage of July 1st, A. D. 1871, by deed of that date, from Charles R. McFadden, deputy sheriff, by virtue of the sale on execution of said right of redemption, and that the time for redeeming from said sale expired without any redemption therefrom.

SOMERSET RAILWAY,
By WEBB, JOHNSON & WEBB.

August 25, 1890.

Supreme Judicial Court.

Filed August 26, 1890.

W. S. CHOATE, *Clerk.*

KENNEBEC, ss :

In the Supreme Judicial Court.

Inhabitants of the Town of Anson *et als.*, petitioners for the appointment of trustees under a certain deed of trust, in which the Somerset Railroad Company is grantor.

The answer of Edmund F. Webb and Everett R. Drummond, both of Waterville, in said county, being interested in the matters set forth in the complainants' bill in equity.

The said Webb and Drummond admit that said Somerset Railroad Company was a corporation duly organized; and that on the first day of July, A. D. 1871, it made and executed the mortgage deed, to Lewis Pierce, Daniel Holland and Stephen D. Lindsey; and issued bonds to the amount of four hundred and fifty thousand dollars; and that said bonds were sold in the market, and that said railroad was open to the public, and that the same had been extended and had made connections with the Maine Central Railroad Company, as averred in the complainants' bill.

Said Webb and Drummond, further answering, say that they have no knowledge that the complainants are owners in the capital

stock of said Somerset Railroad Company, and of the bonds of said Somerset Railroad Company, as averred in the complainants' bill, and pray that the complainants may be required to make due proof thereof.

Said Webb and Drummond, further answering, admit that no provision is made in said mortgage deed for the appointment of new trustees to fill vacancies occurring in the board of
247 trustees; and they further admit the death of the said Daniel Holland and Stephen D. Lindsey, and that no new trustees have been appointed as their successors as averred in the complainants' bill.

Said Webb and Drummond, further answering, say that said trustees, named in said mortgage, or deed of trust, never took possession of the mortgaged property; that the same remained in the possession of the said Somerset Railroad Company until the formation of a new corporation, entitled the Somerset railway, hereinafter more particularly described; and that said trustees never took any measures to secure a foreclosure of said mortgage for a breach of the condition thereof.

Said Webb and Drummond, further answering, aver that on the first day of April, A. D. 1883, there had been a breach of the conditions of said mortgage; that the interest on the bonds secured by said mortgage had been due and payable for more than three years, and then remained unpaid; that the holders of said bonds, to an amount exceeding one-half of the same, elected, in writing, to form a new corporation, as provided by the laws of this State; and that the holders of the bonds described in the complainants' bill, formed a new corporation, composed of the holders of said bonds, under the name of the Somerset railway; that said corporation was organized in the manner provided in chapter fifty-one of the Revised Statutes, and acts additional thereto and amendatory thereof; that said Somerset railway adopted a code of by-laws, and elected directors, and did all acts required to be done, to complete said corporation; that the capital stock of said new corporation, called the Somerset railway, was seven hundred and thirty-five thousand two hundred and thirty-four dollars; and was made up as follows, viz., four hundred and fifty thousand dollars, principal, of said bonds, and two hundred and eighty-five thousand two hundred and thirty-four dollars, interest due thereon, and unpaid August 15th, A. D. 1883.

Said Webb and Drummond, further answering, aver that the complainants in this bill in equity, on the eleventh day of July, A. D. 1883, petitioned, or signed a call, with other holders of said bonds,
248 to an amount exceeding more than one-half of the same, requesting that due notice be given of a meeting of the holders of said bonds for the purpose of forming such new corporation, so composed of said holders; and that said meeting was held, and that the bonds described in the complainants' petition, were represented by the complainants at said meeting; and that at said meeting said bondholders voted for the formation of a new corporation; and that at said meeting three hundred and fifty-one thousand nine hundred dollars, in par value, in amount of the bonds described

in the complainants' bill, were represented in the call for said meeting; and that the whole amount of bonds then outstanding was four hundred and fifty thousand dollars; and that at said meeting said bondholders organized said new corporation, as provided by law, under the name of said Somerset railway, namely, on the — day of —, A. D. 1883; and that William H. Brown was a member of the firm of Brown & Hilton, one of the complainants, and that he was elected a member of said board of directors of said Somerset railway, and accepted said office, and has been annually elected as such director and acted as such until his decease in November, A. D. 1889.

Said Webb and Drummond, further answering, aver upon information and belief, that on the first day of September, A. D. 1883, said Somerset railway, under its organization, as aforesaid, took possession of the railroad and other mortgaged property embraced in said mortgage, dated July first, A. D. 1871, and thereafter operated said railroad for the benefit of this corporation, viz., the Somerset railway, and has continued to so operate said railway to this date.

Said Webb and Drummond, further answering, aver that a majority of the bondholders of said Somerset Railroad Company, converted their bonds into the stock of the new company, viz., the Somerset railway; and that the said bonds of said Somerset Railroad Company were delivered up to the said Somerset railway and cancelled; and the said Somerset railway issued to the holders of such bonds, shares in the capital stock of said Somerset railway, in lieu of the bonds so surrendered and cancelled; and that the same so remains to this day; and that the complainants in said bill agreed to surrender the bonds described in their said bill to
249 said Somerset railway, and to take in lieu of said bonds, certificates of the capital stock of said Somerset railway, as provided by law.

Said Webb and Drummond, further answering, aver that at a meeting of the stockholders of said Somerset railway, held at Oakland, on the 22nd day of June, A. D. 1887, and at a meeting of the directors of said company, held at said Oakland, on the first day of October, A. D. 1887, said Somerset railway was authorized to issue its bonds to the amount of two hundred and twenty-five thousand dollars, said bonds payable in thirty years from the first day of July, A. D. 1887, with interest; that for the purpose of securing said bonds and the coupons thereon, said Somerset railway conveyed, in mortgage, and in trust, to Joseph R. Bodwell, then in full life, but since deceased, and to these respondents, and their successors, in joint tenancy, the railroad of said Somerset railway, from its junction with the Maine Central railroad, in said Oakland, to its terminus in Bingham, together with all the franchise of said company, and its real estate and personal property; and that said Somerset railway issued in amount two hundred and twenty-five thousand dollars, in bonds, which were sold upon the market, and are generally held by savings banks in the State of Maine; and that the said trustees accepted the trust as stipulated in said deed of trust, and certified said

bonds as such trustees, and have continued to exercise the duties of said office from thence to this date.

Said Webb and Drummond crave to make said deed of trust, from said Somerset railway to said Joseph R. Bodwell and themselves a part of this answer, and to file a copy thereof with the same effect as if it were recited herein at length.

Said Webb and Drummond, further answering, aver upon information and belief, that said Somerset railway having sold said two hundred and twenty-five thousand dollars, in bonds, used the proceeds thereof in constructing an extension of its road, under its charter, from the village of North Anson to Bingham; and that said extension has been constructed and is now open to the public, and in full operation by the said Somerset railway.

250 Said Webb and Drummond, further answering, aver upon information and belief, that the mortgage described in the complainants' bill has become *functus officio* and is invalid, and that no valid appointment of trustees can be made under it; that it has ceased to be security for said bonds, and that the purpose of the complainants is to have trustees appointed for the purpose of taking possession of said Somerset railway and to take and hold such possession, as against the rights of these respondents, and all other persons; and these respondents aver that such conduct on the part of such trustees would destroy the value of the bonds issued by said Somerset railway, and be a gross violation of law.

Said Webb and Drummond, further answering, aver upon information and belief, that said mortgage given to secure the bonds upon which the Somerset railway corporation was formed, dated July 1, A. D. 1871, was foreclosed by a decree of the supreme judicial court, in the county of Kennebec, as provided by law, the final decree therein being dated April 1, A. D. 1887, and that said judgment of foreclosure has never been reversed or annulled, but remains in full force and virtue.

Said Webb and Drummond, further answering, upon information and belief, aver that on the eighth day of July, A. D. 1884, said Somerset railway purchased all the right in equity which said Somerset Railroad Company, or any of the parties claiming under it, had of redeeming said mortgaged property from said mortgage of July 1, A. D. 1871, by a deed from Charles R. McFadden, deputy sheriff, by virtue of the sale on execution, of said right of redemption, and that the time of redeeming from said sale expired without any redemption therefrom.

August 25, 1890.

EDMUND F. WEBB,
EVERETT R. DRUMMOND, *Trustees*.

Supreme Judicial Court.

Filed August 26, 1890.

W. S. CHOATE, *Clerk*.

251 Counsel for defendant also offers stenographer's report of the testimony of G. T. Stevens in the said case of Inhabit-

ants of Anson *et als.*, petitioners for appointment of trustees, as follows :

G. T. STEVENS, called by the Somerset railway, testified :

I can state the number of bonds I turned over to S. S. Thompson's administrator after Thompson's decease. I have the administrator's receipt here which reads as follows: " Boston, Jan. 20, 1890. Received of G. T. Stevens \$28,700 par value of the bonds of the Somerset railroad, being the property of the estate of S. S. Thompson. (Signed), S. W. McCall, executor." I haven't the numbers here, and I cannot say I can find them, but if I can I will give them to the reporter. Previous to this, several years ago, and while I was holding the bonds, Mr. Thompson wanted to see one and I told him I might send McCall one, and I shipped him a hundred-dollar bond. \$28,800 originally came into my possession, and I finally turned over to the executor \$28,700. These bonds came into my possession in 1875 or 1876 I think. I was treasurer of the West Waterville savings bank until the winter of 1875, and then resigned, and Bryant took the place, and those bonds came to me through his hands, not very long after I was out of the bank.

Q. How do you know they belonged to Thompson?

A. Thompson wrote an order for me to withdraw his bonds from the bank and take possession of them, not only the Somerset railroad bonds, but the town of Embden bonds which with the coupons amounted to about \$14,000. I retained them in my possession from the time I took them until 1890. I sold the Embden bonds three or four years ago. Don't think the numbers of these Thompson bonds would be in the bank at Oakland, as they were deposited there simply for safe keeping.

Cross-examination :

Q. How soon after you received these bonds in 1875 or 1876, did you see Thompson personally?

252 A. I saw Thompson personally all the way along every year or two. I brought some actions for him, sued Embden.

Q. Did you act for Thompson as attorney, in relation to these bonds from the time you received them until the time you gave them up to his administrator?

A. I think I did. I was not aware that any one else had anything to do with them.

Q. Were these bonds ever out of your possession from 1876 down to 1890, when you gave them to his administrator?

A. I could not state the exact time when they came into my possession, but from the time when they came into my possession until I turned them over to his executor, they were never out from under my control; but I had them deposited in the bank.

Q. Did Josiah H. Drummond ever have these bonds in his possession from the time you received them, down?

A. He never did, and never saw them.

Q. Did you have any written power of attorney from Thompson to act for him in relation to these bonds?

A. Yes, sir, I did. I had a power of attorney from Thompson to act for him. I haven't it here but I have Thompson's letter here, which shows what I did have.

Mr. WEBB: Where is the power of attorney?

A. It is my opinion that at the last railroad meeting we had at Oakland, when they mortgaged the road to secure the new bonds, when I voted Thompson's stock, I pinned the proxy to the amount of stock and passed it in. That is my recollection of it. I have some of Thompson's letters here that will speak better for this than I can. I will say I got the proxy from Thompson, on May 19, 1887, as shown by Thompson's letter.

Q. Did you have any power of attorney from him before that time?

A. I don't think I had a power of attorney, simply as attorney.

Q. But you had all of the bonds, and charge of them, before that date?

A. Yes, sir, some time.

253 The letter marked "Petitioners' Exhibit A," is in the handwriting of Mr. Thompson, and signed by him, and I received it from him. (Counsel for petitioners placed in evidence the letter under the objection of counsel for those making answers, on the ground of irrelevancy and incompetency.)

PETITIONERS' EXHIBIT "A."

S. S. Thompson.

LYNDONVILLE, VERMONT, *May 23d, 1887.*

G. T. Stevens.

DEAR SIR: In any acts on that proxy at the Somerset meeting, don't do anything that will waive any right I may have to an appeal to the courts for injunction, or an action in equity.

But do all you can to prevent their mortgaging the road. I think there is no call for that until they can see what they can do about a lease.

Yours truly,

S. S. THOMPSON.

Redirect:

Q. I want to show you what purports to be the record of the stockholders of Somerset railway, on page five, dated August 15, 1883, and ask you if you know in whose handwriting it is?

A. I do not know.

Q. I will ask you to begin at the third line from the top, and read down?

A. (Witness reads from book.) "The whole amount of bonds presented to your committee by the holders or their proxies, not reckoning overdue coupons, is \$354,600, presented as follows: Sumner S. Thompson, by Josiah H. Drummoud, proxy, 31 \$1,000 bonds, numbers 2 to 16 and 45 to 50, amounting to \$21,000, and 15 \$500

bonds, numbers 106 to 120, amounting to \$7,500, 3 \$100 bonds, numbers 50, 89 and 239, amounting to \$300."

Q. Whether or not you know that Josiah H. Drummond, had such proxy as is suggested in the record?

A. I have no knowledge of it.

Q. Did you in the year 1883, have a proxy to vote upon the questions raised in this meeting, namely, the organization of the Somerset railway?

A. I don't think I had any such proxy.

It is admitted that the petitioners' bonds described in the several petitions amount to more than one-half of the outstanding bonds of the Somerset Railroad Company.

Counsel for the defendants also offers the following from the court record in the above cause, it being additional to a portion already offered by the plaintiff:

"The foregoing bill in equity was filed and entered in the clerk's office, in this county, April 24, 1883, and a subpœna issued commanding said defendants to appear before this court, on the first Tuesday of June, 1883. Thence the case was continued to June 5, 1883; when and where Baker, Baker & Cornish, appeared and entered their appearance for said defendants, and the case was continued to July 3, 1883, when and where the respondents filed a demurrer to said bill, as follows, viz:

Now come the defendants and say that the plaintiffs are not entitled upon their said bill for the relief prayed for, because the bill does not contain any matter in equity whereon the court can ground any decree or give the plaintiffs any relief against the defendants and the defendants demur thereto.

And for cause of special demurrer they show as follows:

1. Because Lewis Pierce, of Portland, in the county of Cumberland, Daniel Holland, of Lewiston, in the county of Androscoggin, and Stephen D. Lindsey, of Norridgewock, in the county of Somerset, the trustees and grantees named in the mortgage dated July 1, 1871, given by the defendants to said Pierce, Holland and Lindsey, and which the plaintiffs have set forth in full in their said bill, and which they claim to foreclose are not made parties to said bill, either as plaintiff or defendants, nor are there any reasons given why they are not so made parties when they have an important interest in said mortgage.

255 2. Because the plaintiffs are not parties to said mortgage and contract, and have no right or authority to bring or maintain their said bill to foreclose the same in their own names; but such right and authority are vested exclusively in the said Lewis Pierce, Daniel Holland and Stephen D. Lindsey, hereinbefore named and described, and who are the only mortgagees named in said mortgage, and who have never assigned their interest in the same to the plaintiffs.

3. Because there is a plain, adequate and sufficient remedy for the foreclosure of said mortgage at law, within the same time, under the same provisions of the Revised Statutes, chapter 51,

sections 53, 54, 55 and 56, on the application of one-third in amount of the bondholders to the trustees named in said mortgage for that purpose, who are obliged by said statute to proceed, and immediately to foreclose said mortgage by advertisement in some newspaper in each county where the mortgaged property is situated.

4. Because it is not alleged in said bill that one-third of the bondholders in amount have ever applied to said trustees to have them institute proceedings for the foreclosure of said mortgage.

5. Because there is no allegation in said bill that the coupons for interest, stated therein to be unpaid, were ever presented for payment at Boston, or at the treasurer's office, of said Somerset Railroad Company, as required in said coupons and in said mortgage; nor is there any sufficient allegations in said bill of a breach of the conditions of said mortgage.

6. Because by the terms of said mortgage, the trustees aforesaid, named in said mortgage, are constituted the sole judges *prima facie* of the breach of the conditions of said mortgage, and there is no allegation in said bill that they have ever acted on that question or adjudicated that there was a breach of said conditions.

7. Because there is no allegation in said bill that said trustees have ever called a meeting of the bondholders, or that any such meeting has been held by them, or that they have in such meeting determined whether the trustees should take possession of the
256 said Somerset railroad, and operate it on account of the neglect of the company and pay its coupons, though overdue more than ninety days.

8. Because the statute of 1883, chapter 166, section 4, under which it is supposed this bill is framed, is not retroactive and does not entitle the plaintiffs to maintain this bill because said statute is inconsistent with the terms and conditions of the mortgage itself, and does not apply to mortgages made expressly to trustees therein named, when the bondholders are not parties thereto.

By BAKER & PARLIN,

Their Attorneys.

And we certify that in our opinion, this demurrer is well founded in law.

BAKER & PARLIN.

And the undersigned directors of said Somerset Railroad Company hereby certify that this demurrer is not interposed for delay.

ALBERT MOORE.

M. W. PEASE.

JOHN CARNEY.

CALVIN F. WALKER.

SOMERSET, ss:

Then personally appeared the above-named directors, and made oath to the truth of the certificate by them signed.

June 20, 1883.

J. J. PARLIN,

Justice of the Peace.

Thence the case was continued to the October term, 1884, when and where the court overruled the demurrer, and the court ordered a decree of foreclosure of mortgage, unless redeemed July 1, 1885, reserving to defendants, the right to move at next term to open decree and except to overruling of demurrer. Parties waived all objections to the presiding judge on account of interest in subject-matters. Thence the case was continued to April 1, 1887, when and where the final decree was filed as follows, viz:

This case came up for hearing at the term of said court, held in and for said county on the third Tuesday of October, A. D. 1884, when the respondents' demurrer to the bill of complaint was overruled, and it appearing to the court that the several allegations in the bill of complaint were true, it was ordered, adjudged and decreed, that upon the defendants paying the amount of coupons then overdue as particularly alleged in said bill on or before the first day of July, A. D. 1885, said complainants take nothing by their said bill.

But in default of said defendants paying the amount of said coupons as aforesaid, by the time aforesaid, it was ordered and decreed that the said defendants do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to said mortgaged premises.

And now on this thirty-first day of March, A. D. 1887, it appearing that said respondents did not within the time aforesaid, and have not since, paid the amount of said overdue coupons, nor any of them. It is ordered and decreed that said defendant be now absolutely debarred and foreclosed of and from all right of redemption, of, in and to said mortgaged premises, under the mortgage thereof made to said Lewis Pierce, Daniel Holland and Stephen D. Lindsey, dated the first day of July, A. D. 1871, as alleged in the bill of complaint.

CHARLES DANFORTH,
Justice Supreme Judicial Court.

DRUMMOND & DRUMMOND, *Solicitors.*

STATE OF MAINE, }
Kennebec, } ss:

AUGUSTA, SATURDAY, *March 19, 1887.*

And now on this thirteenth and last day of the term the court order, that judgment be entered in all matters finally acted upon and disposed of, except cases in which judgment has been ordered on motion as of an earlier day; that continuances be entered in all other matters unless previously continued, and that this court be adjourned without day.

Attest:

A. C. OTIS, *Clerk.*

A true copy of record.

Attest:

W. S. CHOATE, *Clerk.*

Officer's Return of Service of Bill in Equity.

REUBEN B. DUNN & als., in Eq., }
 v. }
 SOMERSET RAILROAD COMPANY. }

KENNEBEC, ss :

APRIL 27, 1883.

I made service of the precept, upon the within-named Somerset Railroad Company by giving A. R. Small, treasurer of said company, an attested copy thereof in hand.

C. R. McFADDEN,
Deputy Sheriff.

Fees.

Service...	\$ 50
Travel	72
Copy.....	1 00
	<hr/>
	\$2 22

Counsel for defendants also put in evidence, from the stockholders' records, the following from the record of the annual meeting of the stockholders of the Somerset Railroad Company, held Wednesday, June 11, 1884:

"To fix the number and choose a board of directors for the ensuing year, and for the transaction of any other business that may legally be brought before them."

By order of the directors.

259

NORRIDGEWOCK, May 17, 1884.

Notice and Publication.

1884. Stockholders' annual meeting, Somerset Railroad Company.

The annual meeting of the stockholders of the Somerset Railroad Company will be held in Memorial hall, Oakland, on Wednesday, the 11th day of June next, at ten o'clock in the forenoon.

1st. To fix the number and choose a board of directors for the ensuing year.

2d. For the transaction of any other business that may legally be brought before them.

Per order of the directors.

EDWARD ROWE, *Clerk.*

NORRIDGEWOCK, May 17, 1884.

The foregoing notice was published three weeks successively in the Union Advocate, a newspaper published in Anson, in the county of Somerset, and the Kennebec Journal, a newspaper published in Augusta, in the county of Kennebec, the first publication being fourteen days before the day of said meeting.

A true record.

Attest :

EDWARD ROWE, *Clerk.*

(Notice Published.)

Somerset railroad.

The annual meeting of the stockholders of the Somerset railroad will be held in Memorial hall, Oakland, on Wednesday, the 11th of June next, at 10 o'clock in the forenoon.

1st. To fix the number and choose a board of directors for the ensuing year.

2d. For the transaction of any other business that may legally be brought before them.

Per order of directors.

EDWARD ROWE, *Clerk.*

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NORRIDGEWOCK, *May 7, 1884.*

1884. *Stockholders' Meeting.*

Pursuant to the foregoing notice, the stockholders met at the time and place appointed, and the meeting was called to order by the president.

The record of the call of the meeting was read by the clerk.

The treasurer's report was read by the treasurer, accepted and ordered to be put on file.

On motion that a committee of three be chosen to receive, sort, and count the votes for directors, A. R. Small, of Oakland, B. P. J. Weston, of Madison, and Edwin Collins, of Anson, were elected.

The committee having attended the duty assigned them, reported that all the votes received were for John Ayer, R. B. Dunn, Edward Rowe, W. H. Brown, Nathan Weston, F. W. Hill, R. W. Dunn, S. S. Thompson, C. A. Harrington, Geo. E. B. Jackson, and Albert Moore, and they are unanimously elected.

Report accepted.

Voted to adjourn.

A true record.

Attest:

EDWARD ROWE, *Clerk.*

Counsel for the defendants also put in evidence, from the records of the directors, the following:

Directors' Meeting, 1884.

Meeting of the directors immediately after the adjournment of the stockholders' meeting, in Memorial hall, June 11th, 1884.

Present: Mr. Ayer, R. B. Dunn, N. Weston, C. A. Harrington, R. W. Dunn, and Rowe.

Meeting called to order by the clerk.

By ballot, John Ayer was elected president, Edward Rowe, clerk, A. R. Small, treasurer, W. M. Ayer, superintendent.

On motion of Mr. Harrington, that some competent person be employed to examine the accounts of the company, and report the same; voted, that W. A. R. Boothby be employed.

Voted, that J. H. Drummond, of Portland, be a committee to purchase the right of redeeming the mortgage, or if sold at auction, to bid it in, provided it can be done for such price as shall be deemed reasonable.

Voted, to adjourn.

A true record.

Attest :

EDWARD ROWE, *Clerk.*

SOMERSET, ss :

JUNE, 1884.

Personally appeared Edward Rowe, duly elected clerk of the Somerset Railroad Company, and made oath that he would faithfully discharge the duties of said office.

Before me—

C. A. HARRINGTON,
Justice of the Peace.

(These are the last records of meetings of the stockholders and directors of the Somerset Railroad Company, that appear upon the books.)

Counsel for defendant also offers in evidence stenographer's report of the testimony of Edwin Collins in said suit of Inhabitants of Anson, petitioners, as follows :

EDWIN COLLINS, called by the petitioners, testified :

I was one of the selectmen of Anson, and so was W. W. Pease, in 1883.

Q. Whether you had any authority from the town in any way to vote in or take part in the organization of this alleged new Somerset railway ?

A. No, sir.

Q. Whether there was ever any action taken, to your knowledge, or any meeting ever held by the town by which any authority was conferred upon you or anybody else to put the bonds of
262 the town into this new organization, or to change the old bonds which the town owned in any way ?

A. No, sir, not during that year at any rate, and I have no recollection of any.

Q. Did you attend any new meeting of the new company ?

A. Yes, sir.

Q. Whether you and Pease, or either of you, to your knowledge, at any time had any authority from the town to take any action in relation to the bonds that your town owned ?

A. No, sir.

Q. Now it appears from the record that Mr. Webb has put in that you and Pease took some action in relation to the bonds of the town at the time this alleged new company was formed. Upon whose authority and at whose request did you do it, and state how you came to do it ?

A. I have no doubt I signed that paper dated July 11, 1883, the

call for a meeting of the company to be held August 15, 1883, or I signed some paper like that.

Q. How did you happen to sign that paper, or call as they term it?

A. I really haven't much recollection, scarcely any, of signing it at all. I have no doubt I signed it. I have no recollection of the circumstances or why I signed it. Have no recollection of who handed me the paper to sign or why I did sign it, or why I was induced to. It was by no authority of the town.

Q. Have you any recollection of any statements made to you by Mr. Drummond, or Mr. Frank Hill, as to your signing the paper?

A. Not as to that. The conversation I had with Drummond was at Oakland, I presume on the day of the meeting, that he said it was merely a form to go through with.

(The statements of Drummond were objected to by counsel for the Somerset railway.)

Q. Then it is in relation to the time of the meeting in August the 15th, that you are speaking about?

A. Yes, the only time I ever met Mr. Drummond. It was August 15th, or whatever the date was.

263 Q. The time when they undertook to get up this new organization?

A. Yes, it was. I did not know I had signed this call until my attention was called to it today.

Q. I will call your attention to a conversation, if you had one, with Mr. Drummond or anybody else at the time of this meeting, August 15, 1883, and under what representations, if any, you acted at that time?

(Objected to and admitted.)

Q. How came you to take any part in that meeting called for a new organization, acting for the town of Anson?

A. I had no authority from the town?

Q. How came you to do —?

A. J. H. Drummond of Portland approached me there. He was there and I was ignorant of such matters and knew nothing about them although we had always been cautious of this company. He told me it would not affect any interest or title our town had in it; it was merely a form to go through, that the old stockholders had agreed that was good for nothing and were going to fall back on our bonds, on the mortgage bonds, as I understood it, and that this was merely a form to go through which would have to be to form a new company and take possession of the road, or something of the kind. But it would not affect the town's interest in it, and possibly it might benefit it, as we might get something out of it in that way.

Q. Whether you were induced by those representations of Drummond to take the action you took in behalf of the town of Anson, at the time of the organization?

(Objected to and admitted.)

A. It was the representations. Frank W. Hill also approached me in the same manner.

Q. What representations did he make?

A. Very similar to those Mr. Drummound made.

Q. Now whether it was in consequence of these representations made to you by Drummound and Hill, that you signed, apparently for the town of Anson, and took part in this new company?

264 A. I had no other object only what I considered for the best interests of the town. It was in consequence of their representations.

Q. Whether you had any authority from the town in any way to make such signature?

A. I had no authority whatever.

Cross-examination:

I was first elected selectman in 1882, and was elected in 1883, 1884 and 1885.

Q. Did you understand that the call embraced the idea to see if the bondholders would decide to form a new corporation and to elect officers?

A. I presume I must have, but I have no recollection of it.

Q. Did you confer with your colleague, W. W. Pease, selectman of Anson, in relation to signing the call?

A. I presume so, but I have no recollection of signing it. I have no reason to doubt that I signed it. I have seen what purports to be a slip coming from the newspaper pasted into the record book. I have no doubt I signed it. I have not seen the original call. When I signed that I thought I was acting for the best interests of Anson.

Q. Did you consult any citizen of Anson in regard to the matter?

A. Not that I recollect of.

Q. From the time you signed the call on July 11th, down to the meeting of August 15, didn't you talk with the people of Anson in relation to it?

A. I have no recollection whatever of it. Pease and I attended the meeting on August 15th, at Oakland.

Q. Did you vote the bonds of the town of Anson?

A. I cannot say that we did. I don't remember whether we did or not.

Q. What did you go there for?

A. To attend the meeting.

Q. You put the town of Anson bonds in, didn't you, with the other bonds that participated in the meeting?

265 A. No, I don't think we did. I have no recollection of voting on them; no recollection one way or the other. I could not say whether Pease voted. I don't remember that I voted on any question in that meeting. I presume the president was the chairman of the meeting, but I don't remember the person nor the name of the secretary. I could not say what was done at the meeting. The meeting was held in Memorial hall. I went down from

Anson on the morning train, and presume I did not go back until night, but I cannot say. Cannot say whether Pease went with me. I went down there to attend the meeting, but I really did not know what for. It had been customary for the town officers to go down and attend to annual meeting, and perhaps special meetings. I have here the records of the town of Anson.

Q. And have you examined them to see if there is any vote of the inhabitants of Anson in relation to the bonds issued under the mortgage of the Somerset Railroad Company?

A. I have. I see none whatever. I have no doubt that I saw this notice that was published in the Union Advocate, at North Anson. I don't remember of any inhabitant of Anson speaking to me in relation to it.

Q. State just what inducements Josiah H. Drummond held out to you which caused you to sign that paper?

A. Not any. This meeting I had with Drummond was at the time of the meeting. I had then signed the call. This was the meeting and in answer to the call.

Q. State what he said?

A. I was as green as could be in such matters, and I could not see what it was leading to and Drummond told me that it would not affect the interests of our town at all but it was a matter of form to go through with, that it was just going to change over. He approached me.

Q. Did he know you?

A. Yes, he found out who I was. I did not ask him whether he knew I was there as a selectman, but I presume he did.

Q. Now what was it you did on the strength of Drummond's representation?

266 A. I don't remember whether I voted there or not. He did not induce me to sign the call because I signed it before I saw him.

Q. What inducements did Frank W. Hill make?

A. Just about the same as Drummond, that it was the thing to do, that it was for the best interests of our town and all concerned. I know Wm. H. Brown of Anson. I don't know whether he participated in the new organization, and I don't know whether he was there. I presume I went down there to look out for the interests of Anson.

Counsel for defendants also offered in evidence stenographer's report of the testimony of W. W. Pease, in the same case, as follows:

W. W. PEASE, called by the petitioners, testified:

I have no recollection whatever about signing this call of July 11th, 1883, for a meeting to be held August 15th. I never shall believe I signed it until I see my signature. I don't think I signed it. I cannot give the date that the meeting was held, but I was at a meeting where they wanted to change the name of the Somerset Railroad Company, to the Somerset railway. They thought it would

be better to discard the stock and place it on the bonds, as they could pay no interest on the stock, and possibly they could pay a little interest on the bonds.

Q. Now were any representations made to you by anybody, and if so, by whom and what were they?

A. There was that kind of talk made by Hill and Drummond, and I remember of Drummond, being there at this meeting, and the talk made was that it was better for all hands concerned to change over, to change the name; all it was going to effect was to change the name and change the board of directors, and make it a little better for the bondholders, because they might possibly be able to pay some interest on the bonds, but they couldn't pay any on the stock and bonds. But I have no recollection whatever of signing the call, and never shall believe I did until I see my signature.

When I see that I shall know I have forgotten.

267 Q. Whether you had, or Mr. Collins to your knowledge, any authority from the town to take any action whatever at this meeting in relation to the new company there attempting to be organized?

A. We never had any. I never did.

Q. Was there ever any meeting of the town in which any such authority, to your knowledge, was conferred upon you or anybody else?

A. No, sir; never.

Q. By what representations or inducements if any, were you led to take part in this organization of the new company in behalf of the town?

A. I never supposed I was taking any part in any new organization. I was always opposed to the new organization.

Q. Mr. Webb has introduced a record here in which it is recited that you did take some part in that organization by undertaking to put the town of Anson's bonds in there.

A. I never had any such idea, far from expecting or having any authority to do any such thing.

Q. Now what induced or led you at that time to do what you did do, whatever it may be that you did?

A. If I did do a thing of that kind I was misled, thought I was serving the Lord when I was serving the other fellow. But I am slow to believe I did do it.

Q. Have you any recollection that you undertook to put the bonds of the town of Anson into that concern in that way?

A. No, sir.

Q. Have you any belief that you undertook to put the town of Anson's bonds into that new concern in any way?

A. No, sir.

Q. And you do know that you had no authority to do it?

A. I know I had no authority to do it. I know there was never a moment that I wanted to do it if I had had the authority. I have not examined the record of the town.

Cross-examination :

I have doubts that I signed the call, but would not swear that I did not sign it. I don't know whether it was published in the Union Advocate. Could not say I read it there because I don't take that paper.

Q. If you did see it did you make any objection that your name had been forged to that paper?

A. No, sir.

Q. Did you attend the meeting at Oakland in pursuance of that call?

A. I attended a meeting there when they talked of changing the name of the old company over into the new, and Josiah Drummond was there.

Q. You understood that you attended a meeting for which you and other bondholders had signed a call?

A. I don't think I ever signed a call.

Q. Then how happened you to go down to that meeting?

A. Probably had notice of it from the clerk of the Somerset railroad. I have no recollection of attending it in pursuance of a call that I signed, with other bondholders. I don't think I participated in the meeting. I never cast a vote in the meeting. I presume the bonds of the town of Anson were represented at that meeting. I presume so because they were generally represented. They were represented by the first selectman, usually. Mr. Collins was the first selectman and I was the second.

Q. And you assume the bonds were represented and voted in that meeting?

A. I have no recollection of it, and would not swear, but I presume they were.

Q. Did Josiah H. Drummond of Portland talk with you personally, or was it talked generally to the meeting?

A. He made general talk while we were there. Would not say that he stated to me personally about it.

Q. Do you mean to be understood that Josiah Drummond's talk made at that meeting on August 15, influenced you to sign a petition on the 11th of July preceding?

A. If I signed it, I signed it because I thought it would do no harm, and was a mere call to change the name of the road, and it was going to be better for the bondholders. I don't mean that

269 in signing that I was influenced by Josiah H. Drummond or Frank W. Hill. I had had no talk with Drummond before the call was signed. I think it was about two days ago that I first knew that my name and that of Mr. Collins was upon such a call. I was called upon to come down here, and I could not understand the reason for it, and I went up and examined the records to see when I was on the board last, and I found it was when that was, and in the meantime I ran afoul of a newspaper some one showed me; guess the first I saw of it Judge Moore showed it to me, and that is the first I knew I had signed it. Judge Moore is the editor of the Union Advocate. He showed it to me today, but I could not

say what paper it was because I did not unfold it. I did not know what I was summoned down here for. He said I had signed the call and that my name was on it.

Counsel for defendants also offered in evidence stenographer's report of testimony of T. F. Moore, in the same case, as follows:

T. F. MOORE, recalled by the petitioners, testified:

I am the town clerk of Anson, as well as one of the board of selectmen.

Q. Whether you have examined the records of the town for the years 1882 and 1883, to see whether any town meeting was held in relation to the town of Anson bonds, in relation to conferring or giving any authority to Mr. Moore or Mr. Collins or the selectmen of the town, whoever they may have been, to put these town of Anson bonds into any new corporation.

A. I have.

Q. Is there any record of any meeting upon the subject?

A. Not any.

Q. So far as you know was there ever any meeting held by the town of Anson, at any time, in which any such authority was conferred?

A. Not to my knowledge. I find no record of any such meeting anywhere in the records. I brought the town bonds down today.

270 Cross-examination:

Q. Have you examined the town records clear back to ascertain whether there is any vote of the inhabitants of Anson giving the control or management of the interest of the town of Anson in the Somerset Railroad Company stock or bonds to the selectmen?

A. Yes I have. I do not find any such vote.

Q. Is there any vote or votes from 1871 down to 1883, both inclusive, in relation to the Somerset Railway Company?

A. I cannot say as far back as 1871. I went back to 1882.

Counsel for the defendants offered in evidence the following from the records of the directors of the Somerset Railroad Company, page 105, under date of October 24, 1882:

Directors' Meeting.

Meeting of the directors at West Waterville, Tuesday, October 24th, 10 a. m., at the president's office.

Present: Mr. Ayer, Dunn, Weston, Hill, Brown, Pease and Rowe.

Mr. Dunn, for the Dunn Edge Tool Company, proposed to take the bonds held by them at a fixed price, and endorse the amount on notes due them for money loaned the company, or sell them at auction.

The proposition was discussed until noon. We then adjourned to meet at 1.30 p. m.

Met at 1.30 p. m.

The proposition was considered for some time and, as several members of the board were absent, Mr. Hill proposed adjournment to Saturday, October 28th, at 10 a. m., and the clerk be directed to notify the absent members of said meeting.

Voted, on motion of Mr. Hill, to adjourn.

A true record.

Attest:

EDWARD ROWE, *Clerk*.

OCTOBER 25, 1882.

Notified the absent members, by mail, this day.

EDWARD ROWE, *Clerk*.

271

Directors' Meeting.

Meeting of the directors, at West Waterville, Saturday, October 28th, 1882, as per adjournment.

Present: Ayer, Weston, Brown, Dunn, Moore, Pease, Stevens, Rowe.

Meeting called to order by the president.

Mr. Dunn, for the Dunn Edge Tool Company, proposed to take the bonds held by them as collateral for money due at fifty per cent. and endorse the amount on said notes, or sell them at auction and endorse the proceeds on said notes.

The question was discussed until noon. Adjourned to 2 o'clock p. m.

Met at 2 p. m. Absent members not come in. Proposed to adjourn without day, next meeting to be called at discretion of president. Voted to adjourn.

Counsel for the defendants also offered the following from the directors' records:

1883. *Notice for Meeting of the Directors, February 6th, 1883.*

At the request of some of the directors of the Somerset Railroad Company, a meeting of said directors will be held at the president's office, in West Waterville, February 10th, at 10 o'clock a. m., to see what measures the board will take in relation to the advertised sale of the franchises of the said Somerset railroad.

EDWARD ROWE, *Clerk*.

Notice sent to members by mail.

Directors' Meeting.

(Somerset Railroad Company.)

Meeting of the directors at West Waterville, February 10, 1883, at 10 o'clock a. m., at the president's office.

Present: Mr. Ayer, Brown, Carney, Dunn, Mr. Pease, Stevens, Weston, Walker and Rowe.

Meeting called to order by the president.

Notice of the meeting read by the clerk.

272 Mr. Moore presented the following preamble and resolution, and asked that it be read by the clerk, and it was read by the clerk :

Whereas, the Dunn Edge Tool Company has brought a suit, and recovered a judgment, against the Somerset Railroad Company, unknown to said railroad company, and taken out an execution on said judgment and advertised said railroad and its franchises for sale at auction on the 15th inst., therefore be it—

Resolved, that G. T. Stevens, A. Moore and William H. Brown be and they are hereby appointed a committee to petition the court for a stay of said execution and sale, and for a review of said action, to the end that said railroad company may be heard in defense of said suit.

Mr. Stevens declined to act on the committee.

Voted, the committee consist of the two.

On motion of Mr. Moore, that the resolution be adopted and the vote be taken by yeas and nays.

Voted, yeas, Brown, Carney, Moore, Pease, Walker.

Nays, none. (Not a quorum voting.)

The clerk was directed to furnish the committee with a copy of the record of this meeting.

Voted, on motion of Mr. Dunn, to adjourn.

A true record.

Attest:

EDWARD ROWE, *Clerk*.

The foregoing is a true report of the evidence in behalf of the defendants, taken by me.

J. A. HAYDEN,
Official Stenographer.

273 *Deposition of J. J. Parlin, Taken at Waterville on the 4th Day of December, 1893.*

Mr. PARLIN is a witness in behalf of the defendants and examined in their behalf by Hon. D. D. Stewart.

The witness, after being duly sworn, testified as follows :

Direct examination :

Q. Please to state the history of the petition brought by you for the Town of Anson against the Dunn Edge Tool Co., for an injunction, referred to in the testimony of J. H. Drummond heretofore given in this case.

A. I was employed by the town of Anson in December, 1882, I think.

Q. By the town or selectmen ?

A. The selectmen—to bring some suits on coupons of the first-mortgage bonds of the Somerset Railroad Company which belonged to the town of Anson. I brought a suit covering what was then due of \$16,000, in round numbers of the coupons and interest thereon and attached the interest of the Somerset Railroad Company in Kennebec and Somerset counties under the franchise, or

their rights and interests under it. My recollection is that it was the 12th or 13th day of December, 1882. I have not the papers before me. I also at the same time brought a suit for Wm. H. Brown on some coupons belonging to him. It went along about a month or perhaps a little more and I learned that there had been a change in the docket at the court at Augusta under a case brought by the Dunn Edge Tool Co., on some notes against the Somerset Railroad Company. The docket had been changed after my attachment had been made. At the request of the selectmen of our town I consulted Mr. Baker about what was to be done in the matter and I went to Augusta—that I think was in February, '83—and while there we drew a bill in equity.

Q. Whether you satisfied yourself from the information you obtained at Augusta that there had been a change in the docket.

(Objected to.)

274 A. I did. At the time suits were commenced and the interests attached, the suit of the Dunn Edge Tool Co. against the Somerset Railroad Company had been defaulted and court adjourned, and the case had been marked in addition to the word d't'd, F. which I was informed by the clerk meant finished. I examined after our attachment and before this bill in equity and found that after court had adjourned and before our attachment that there had been an entry of "C. F. J." under the case of the Dunn Edge Tool Co., and that a judgment had been taken out at the December term or January, I think, and that they had advertised to sell the right which the Somerset railroad had on a judgment which they had taken out, and fearing an innocent purchaser might buy it and that we would have no right by virtue of a review, we filed this petition for an injunction against their selling it, on the ground that there had been a change without the authority of the court.

Q. As you understood it the previous attachment had run out?

A. At the time when our attachment was made. I understand that more than thirty days at the time their case was defaulted had expired before the court adjourned and that the case had expired by virtue of the thirty days running out; and then after, I found that this entry of "C. F. J." had been put on, after my attachment and after the court adjourned and that they had taken that judgment at the next term—I think the January term—and that they were going to sell on that execution which they took on that judgment, and fearing an innocent purchaser might buy it and parties adverse to us have control of the company and they would not do anything and we brought this petition for an injunction to stop the sale on that execution; I stayed right at Augusta and we finished the bill in equity and I telegraphed the selectmen to meet me in Oakland—as it was a short time—and I took a team and started from Augusta in the morning very early and got up to Oakland by the time the cars came down. Mr. Collins and Mr. Pease, two selectmen, came there and met me, and signed the petition for an injunction, and I had it served at once upon the corporation.

275 Q. The Dunn Edge Tool Company?

A. A hearing was to be had, I think at Augusta, the day before the sale was advertised to come off, and I went there—

Q. Remember what day?

A. My impression is that it was the 15th of Feb., '83 it was advertised to be sold. I think our hearing was to be had the day before, the 14th. I went there and met at Mr. Baker's office; got ready for hearing. Mr. Drummond, I think, appeared for the Dunn Edge Tool Co., Josiah H. Drummond, and we had some discussion about the hearing, and there was considerable talk about the position that the clerk would be in. We satisfied the court that the tampering with the docket had been done after the court adjourned and finally it was proposed by Mr. Drummond that we should do nothing with our bill in equity and that they would not sell the right under their execution.

Q. You mean they would drop their sale?

A. Drop their sale on the execution, if we would drop the bill in equity, and they were to pay costs, Mr. Baker's fees and mine, if we would do it. Mr. Baker thought that it would send the clerk to the State prison and Mr. Drummond thought it would be unpleasant and a good deal of trouble for him and we agreed to drop the petition for an injunction and not have a hearing, and they were to drop the sale. We accomplished just what we claimed.

Q. Your petition was to have them enjoined from making a sale?

A. Enjoin them from making a sale, not only a temporary injunction, but perpetual, upon the Dunn Edge Tool Company, because we knew that their attachment had run off unless they could revive it by that entry of "C. F. J." I have not been to the clerk's office—my docket was burned and I cannot tell just what entry was entered on the docket under our suit, but I know it was dropped by an agreement that the sale should not be made of the right in equity by Mr. Drummond. And they agreed to pay Mr. Baker's costs and mine.

Q. Any agreement as to what amount was to be paid for the cost of the bill in equity?

276 A. It was agreed at the time, I don't now remember how much. It was quite a bill; my impression is that it was in the neighborhood of \$100. I do not know now who did pay me. Somebody paid me and sent the money to me or Mr. Baker and I together. It was paid by somebody.

Q. Paid as you understand it by the parties against whom the bill of injunction was?

A. Yes, that was the ground; they were to pay the costs and stop.

Q. Was there any agreement or any talk between you and Mr. Drummond about Mr. Drummond using his influence or taking any steps to form any new corporation?

A. No, sir; not a word. I never heard of it at that time. If there had been I should not have agreed to it, because our town was al-

ways opposed to it, and I was representing them. I never heard an intimation or lisp of it from Mr. Drummond at that time.

Q. Was there any other ground or reason for your dropping the bill in equity and petition for injunction except by their agreement?

(Objected to as leading.)

Q. My inquiry is whether there was any other ground upon which your bill in equity was dropped except the fact that they agreed to drop their sale and make no sale of the equity, which was exactly what you proposed to accomplish by your petition for an injunction.

(Objected to as leading and also containing statement of fact.)

A. That was the only ground upon which we dropped this petition for an injunction together with the fact that they were to pay the costs and our fees.

Q. Was there anything else that Mr. Drummond was to do or omit that formed any consideration for the dropping or any other reason talked about?

A. Nothing except to drop their sale.

Cross-examination by Hon. E. F. WEBB, counsel for complainant:

Q. You are a resident of Anson?

A. Yes.

277 Q. And reside at the village of North Anson?

A. I do.

Q. How long have you been a citizen of Anson?

A. I went to Anson to live the 20th day of April, '64.

Q. You have been in the practice of law there ever since?

A. Yes.

Q. You were retained as attorney by the town of Anson in the matter of a petition for injunction?

A. The selectmen came to me, I suppose it was for the town. I had the coupons belonging to the town.

Q. The coupons that you stated you brought suit upon were coupons that belonged to the town of Anson?

A. Yes.

Q. They were given to you by the selectmen?

A. Yes, I think Mr. Albert Moore came to me. They were coupons of the \$27,500 bonds that belonged to the town of Anson.

Q. That is the amount of bonds the town of Anson had, \$27,500?

A. Yes, at that time.

Q. You say you brought suit on the coupons belonging to Wm. H. Brown?

A. Yes.

Q. Was he a partner of Benjamin Hilton?

A. Yes.

Q. Their firm name was Brown & Hilton?

A. Yes. These coupons belonged to him and not to the firm, so he informed me. The suit was brought in his name.

Q. When did Wm. H. Brown die?

A. About three years ago, I think.

Q. Was he a director in the Somerset Railroad Company at any time?

A. He has been, I don't know whether he was at that time.

Q. Do you know whether or not he was elected director in the Somerset railway?

A. I think he was. I should say he had been a director in the new corporation.

278 Q. Did you attend the meeting of the organization of the Somerset railway by the bondholders at Oakland?

A. No sir, I did not.

Q. Do you know whether Mr. Brown attended or not?

A. I do not know.

Q. Do you know whether the selectmen of Anson in behalf of the town attended the meeting or not?

A. I have no personal knowledge of it.

Q. What is Mr. Collins' given name?

A. Edwin Collins.

Q. And Mr. Pease?

A. Warren W.

Q. Has either one of those gentlemen told you that they were at that meeting of the bondholders to form a new company?

A. I don't recollect that they have.

Q. Whatever you did as counsel in the bringing of the bill in equity for a temporary and permanent injunction you did as counsel for the inhabitants of the town of Anson as you understood it?

A. I so understood it; to protect their rights on the bonds.

Q. And all the acts which you did in that case were done in your capacity as counsel for Anson?

A. Yes, I had no other interest in it.

Q. You state that you satisfied the court that there had been an alteration in the docket at the hearing at Augusta?

A. No sir, they had no hearing.

Q. What did you say?

A. I said that we became satisfied that there was an alteration but there was no hearing before the court as I remember at all.

Q. You stated in your direct examination that you satisfied the court of the tampering with the docket. Did you make that statement?

A. No, sir. If I did it is wrong. I did not mean to say it and I don't think I did. I said we had a talk with Mr. Drummond, not we satisfied the court it had been tampered.

279 Q. You mean to say that you stated to Drummond that you felt you would satisfy the court there had been tampering with the docket?

A. Yes.

Q. What tampering with the docket did you have in mind?

A. When the docket was first examined after the court adjourned when the case was defaulted.

Q. Your examination?

A. When I first examined it—I examined it first—but it had been examined by another party who notified me—the case was marked as follows: “Dfd.” and then a big “F” on the docket when I examined it. I ascertained this was after court had adjourned and after the thirty days had expired and at the time I made my attachments. After that there had been another entry made that was not there at the time of the attachment, marked “C. F. J.” which I supposed meant “continued for judgment.” That was not on the docket at the time of the attachment.

Q. Then you told Mr. Drummond the docket had been tampered with by adding the words “C. F. J.”?

A. Yes. I not only told him, but—

Q. I don’t care for that. You say it was the addition of the expression “C. F. J.”?

A. Yes.

Q. And you say that the expression was added after the court adjourned?

A. Yes.

Q. In whose handwriting were the letters “C. F. J.”?

A. I cannot tell you.

Q. Did Mr. Drummond look at the letters?

A. He looked at the case.

Q. Did he look at the letters?

A. He looked at the entry and the docket—I suppose he did.

Q. Who was clerk of courts at that time?

A. I think Mr. Otis.

Q. A. C. Otis?

A. I think so.

280 Q. Was Mr. Otis’ attention called to the fact that there had been a forgery upon the docket?

A. Yes.

Q. What did he say?

A. Very little about it.

Q. What did he say?

A. I don’t remember his exact words about it.

Q. Did he say anything?

A. He made some remark about it; I don’t remember now.

Q. Will you swear his attention was called to it?

A. Yes, sir.

Q. Was it stated or intimated to Mr. Otis or intimated in the presence of Mr. Otis, that the docket had been tampered with?

A. The docket had been changed from the time of the date of those attachments—

Q. Was that intimated in his presence?

A. Yes.

Q. State his reply.

A. He said very little about it.

Q. You stated in your direct examination that it might result in sending the clerk to State prison?

A. Mr. Baker said so.

Q. Did he say it in the presence of the clerk, A. C. Otis?

A. I do not think he did.

Q. Did Mr. A. C. Otis, the clerk, tell you that the docket had been tampered with by forging the letter, "C. F. J."?

A. He did not explain how it got there; said very little about it.

Q. Was Mr. Drummond and yourself in the clerk's office in the presence of the clerk when it was done?

A. We were there together and looked it over.

Q. Were Drummond and yourself present with the clerk when the charge was made that there had been a forgery committed upon the docket, or that the docket had been tampered with by adding the letters "C. F. J."?

A. Mr. Baker and I and Mr. Drummond were in the clerk's office and examined the docket and talk was made about it, being
281 changed in the presence of Mr. Otis. He didn't give any explanation of how it had been done.

Q. Did he say that the letters "C. F. J." were in his handwriting?

A. No, sir.

Q. Have you looked at those letters since to see if they were in his handwriting?

A. No, sir.

Q. At what term of the supreme court at Augusta was this entry made upon the docket where you say the letters "C. F. J." had been added?

A. The 12th of December, I think, 1882—the date we brought those suits.

Q. Did you state in the presence of A. C. Otis, the clerk, that you could satisfy the court that the docket had been tampered with since the court adjourned?

A. I do not know as we said it in his presence; we talked it over.

Q. Did you or did Mr. Baker in your presence call upon A. C. Otis for any explanation of the alleged forgery of the letters "C. F. J."?

A. We went there at one time when this bill in equity——

Q. Answer the question.

A. Yes, we went there and asked him about it.

Q. What did he say?

A. Would not say very much about it anyway.

Q. Did you give him to understand in your opinion the letters "C. F. J." were a forgery?

A. They were changed from what they ought to have been. We gave him to understand that.

Q. Do you mean to say there was a change or that they were a pure original entry?

A. I mean to say that at the time of the court closing and 30 days they were not there and before the next court they were there.

Q. You do not mean to say they were changed?

282 A. O no, they were put there without any right, as we claimed.

Q. When do you mean to say the court preceding the forgery by adding the letter- "C. F. J." adjourned?

A. Adjourned prior to the middle of December, '82, my recollection is.

Q. Have you ever seen that docket with those letters "C. F. J." since?

A. I do not think I have ever looked at it since that time.

Q. You say you have read a copy of the petition in equity which you and Mr. Baker made for an injunction within a few days?

A. Yes.

Q. Have you seen a copy of the testimony of J. H. Drummond given in this suit at Portland?

A. No, sir.

Q. Have you been informed of the general outline of the testimony he gave in the suit by Mr. Stewart or any one else?

A. Perhaps so, yes.

Q. Have you been informed that he produced and read in evidence certain letters from you in the course of correspondence between you and him in relation to the case?

A. No, sir.

Q. Did you during the transaction in behalf of the town of Auson write to Mr. Drummond any letters in relation to the matter?

A. I have no recollection of it.

Q. He produced and read either three or four letters of yours in this transaction about the \$100 which you wrote to him.

A. I don't know anything about it. I had forgotten about writing. I presume I may have done it. I don't know. I know they paid the expense.

Q. Did you write a letter during this transaction to Mr. Drummond that you, on the payment of \$100 would withdraw the bill in equity asking for an injunction, and that he might proceed and make that sale of the equity of redemption?

283 A. I have no recollection of it—I don't believe I ever wrote any such a letter. I can't see any reason why I should. I know the arrangement was we should stop all round.

Redirect:

Q. Did this \$100 that Mr. Drummond sent to you or somebody else sent to you under his agreement, cover any expenses except the expense for the bill in equity, your fees and Mr. Baker's or the court's expenses?

A. Nothing else for it to cover excepting my fees. Whether it covered Mr. Baker's fees, I don't know now.

Q. Was there any agreement between you and Mr. Drummond that the suits pending in Somerset county should be dropped, and that this \$100 should cover your costs in those suits?

A. No, sir.

Q. Will you not state what became of those suits in Somerset county?

A. In the suit of Mr. Brown against the company, I took a judgment for \$50 I think, and in the suit of the town against the company I took a judgment for somewhere over \$20 or \$25 or \$30 and full costs in each suit. That was all.

Q. My inquiry is do you remember why you did not take a judgment for the whole amount of the coupons?

A. We came to the conclusion that the equity was not worth while. The main thing was we did not want to cut off the coupons from the bonds to file them in court.

Mr. WEBB: The equity of the Somerset Railroad Company to redeem?

A. Yes.

Q. The equity of redemption under the mortgage of July 1st, '71?

A. The original mortgage.

Q. So you took judgment enough for the coupons and the costs?

A. Yes. I think Mr. Brown's is the largest, \$50. In relation to the arrangement my recollection is that we were to stop proceedings under the petition for an injunction and they were to stop the sale.

284 (Mr. WEBB:)

Q. That is what you mean by "all round"?

A. Yes, exactly.

Q. Any agreement between you and Mr. Drummond about these suits you brought for the town of Anson and Mr. Brown against the Somerset Railroad Company?

A. None that I recollect of.

Q. And I think I have already asked you whether Mr. Drummond or anybody through him paid any of the expenses of these suits?

A. Not as I understand it. They did not.

Q. Do you remember who the selectmen were in '87? The selectmen of Anson?

A. I do not.

It is admitted that the selectmen of the town of Anson for the year '87 were T. F. Paine, H. T. Emery, and F. E. Bixby.

STATE OF MAINE, }
Kennebec, } ss:

On the 4th day of December, A. D. 1893, personally appeared the within-named J. J. Parlin, at the office of Webb, Johnson & Webb, in Waterville in said county, and having been first sworn according to law by me, then gave the foregoing deposition, which was taken by me stenographically, by the consent of the parties to the suit, and was transcribed from my notes.

The said deponent in writing waived the reading of the transcript.

No change or addition to the transcript has been made, and this transcript is a true copy of the evidence given by the said Parlin and taken by me stenographically.

The adverse party was notified to attend and did attend.

Said deposition is to be used in an action between The Somerset Railway, complainant, and Lewis Pierce *et als.*, defendants, said suit to be heard and tried in the supreme judicial court within and for the county of Cumberland, where the same is now pending, and said court in equity now in session.

285 The deponent's residence is in a town other than that in which the trial is to be had and is the cause for taking this deposition.

HELEN REDINGTON,
Commissioner to Take Depositions.

March 14, 1894.

(Letter Attached to Deposition of J. J. Parlin.)

J. Justin Parlin, counsellor-at-law.

NORTH ANSON, ME., March 10, 1894.

MISS REDDINGTON: Both Mr. Stewart and Mr. Webb have written me and requested me to waive the reading of my deposition in the equity suit. I have concluded to do so, though I do not think the deposition was taken as I gave it, nor is this in accordance with the agreement as I understood it, but the deposition should have been sent to me, read and correct- if need be.

Yours respectfully,

J. J. PARLIN.

(Plaintiff Resumes.)

PORTLAND, ME., December 9th, 1893.

JOSIAH H. DRUMMOND, Esq., recalled for plaintiff, testified:

I have read the testimony of J. J. Parlin, taken at Waterville on December 4th, 1893. That testimony is erroneous in many particulars. Mr. Parlin has confounded the petition by the Town of Anson against the Dunn Edge Tool Company for an injunction, with other cases, to wit, with the bill in equity to foreclose the mortgage, and the petition of the Somerset Railroad Company for a review.

The hearing on the motion for a temporary injunction in the case first named was fixed for the 14th of February, and if I stated 286 in my former testimony that it was for the 12th I was in error. Under the order of notice, the notice was to be given by the 12th.

I appeared for the Dunn Edge Tool Company and the other defendants at the time fixed for the hearing. No conversation whatever was had with me in relation to the alleged change of the docket, nor in my presence; nor did I go with Mr. Parlin and Mr. Baker, or either of them, then or at any other time, to examine the docket. I had no knowledge or information of any alleged change in the docket, except as set forth in this petition. I did not attend at the term of the court, as I was living in Portland, but I wrote the clerk,

during the term, saying to him that, if the case was defaulted, I desired to have it continued for judgment, and asking him if he would be kind enough to attend to it for me, and he replied that — would do so. My object in having the case continued for judgment was this: I found that the parties had collateral security for a portion of the notes sued, and I desired time to examine the question whether the collateral should not be sold and applied to the note before judgment was taken. I came to the conclusion that it need not be, but that it could be sold and applied to the execution after judgment with precisely the same effect as if sold before judgment and applied upon the note. I thereupon took judgment at the next term.

When I met the parties at the hearing on the motion for an injunction, I asked them at once what they wanted, stating to them that I was acting in the interest of the bondholders, in accordance with a request to that effect, and that, while the suit was in the name of the Dunn Edge Tool Company, it was simply a means of getting such a title in the bondholders that they could lease the railroad to the Maine Central Railroad Company. This matter was discussed somewhat, and Mr. Parlin and those whom he represented, finally said to me that the reason for their commencing their proceeding was they feared it was a trick to buy in the railroad for a few of the bondholders, and leave the others out. I assured them that there was no such intention, and I was perfectly willing that the sale should be postponed until definite arrangements could be

287 made so that the equity of redemption, which we all considered worthless so far as any intrinsic value was concerned, should be sold and bought in by a corporation representing the bondholders, or in behalf of the bondholders. It was finally agreed that there should be no hearing; that this petition should be dropped, and that I should have the sale postponed, or the proceedings upon the execution dropped as I should see fit. There was not a word said about paying their costs, and no such agreement was made as Mr. Parlin thinks was made or talked of. That agreement was made nearly two years afterwards.

In accordance with my agreement, I had the sale adjourned from time to time until April, when finding that the adjournments had to be so frequent, as an adjournment could only be made for a short time, and that it was involving considerable expense, I, of my own motion, directed the officer to stop proceedings. It was agreed that the sale should not be made, and it was further agreed that the sale should be postponed from time to time until the arrangements which I had in mind were completed.

Mr. Parlin is in error, too, in his statement that his clients were always opposed to forming a corporation of the bondholders. After the arrangement had been made, the parties were all agreed and worked together in the carrying out of my plan. The selectmen of the town of Anson signed the call for the meeting; they were both present at the meeting, and Mr. Collins acted with me on a committee at the meeting, and I received letters from him in relation to the matter.

In accordance with the arrangement also, Mr. Parlin did not press his suits in Somerset county in favor of the town of Anson and in favor of Mr. Brown, to judgment, but they drifted along without anything being done in relation to them, although in consequence of my dropping the sale on execution, their attachment became a first lien on the property.

I cannot fix the precise date when I directed the officer to stop proceedings, but it was after the 3d day of April, 1883, the date of a letter of inquiry from the officer as to whether he should keep adjourning the sale or not.

288 As a part of the plan which I proposed at that time, I subsequently commenced a bill in equity to foreclose the mortgage. They appeared in behalf of the Somerset Railroad Company and filed a demurrer, and the matter then drifted along without any action being taken upon the demurrer during the result of the formation of a corporation of the bondholders. Thereupon I proceeded to have the equity sold and bid in by the new company, in accordance with the arrangements to which I have testified in my former examination. After that had been done I desired to have the foreclosure case disposed of; but it hung along without any apparent cause why it should not have been disposed of according to the general understanding, until the fall of 1884. I had had various talks with Mr. Baker, but he did not feel authorized to take any affirmative action in the matter. In order to bring the matter to a decision, I had the time assigned for a hearing on the demurrer, and notified Mr. Parlin accordingly. Thereupon I received from him a letter dated November 18, 1884, in which for the first time, he broached the matter of the payment of costs. The letter is as follows:

"NO. ANSON, ME., Nov. 18, 1884.

BRO. DRUMMOND: Your favor relating to your Somerset R. R. suits duly rec'd. My clients have been to considerable expense and cost in the various cases and if your clients will pay the same I will advise and get them to let your cases stand as they are and let your mortgage be foreclosed as prayed for in your bill in equity and the sale of the franchise, etc., etc. I cannot attend to the hearing next Friday as I have a matter to attend to here which will require my personal attention, at the very earliest day possible I will attend to it unless you consent to pay our costs let me hear from you by return mail.

Respectfully,

J. J. PARLIN."

Upon the strength of that letter I did not press the case to a hearing, but had various negotiations with Mr. Parlin verbally, and, as

I presume, by correspondence in relation to the matter.
289 The discussion between myself and Mr. Parlin was in relation to the amount of the costs and fees, and the acceptance of his proposition was based entirely upon the question of amount. He at first wanted, as I remember it, \$200, but after considerable negotiation we settled upon and agreed to pay \$100. This \$100 was not paid until 1885, and it was then paid upon the conditions

stated in Mr. Parlin's letter of November 18th, 1884. That was the only \$100 ever paid to Mr. Parlin, or for costs connected with these proceedings, to Mr. Parlin, to Mr. Baker or any one else of which I ever had any knowledge or information, and upon its payment Mr. Parlin performed the conditions agreed upon in his letter of November 18th, 1884, referred to.

When this agreement to pay the \$100 was made, the Somerset cases brought by Mr. Parlin had been defaulted at the March term preceding, although executions had not issued. Judgment was rendered in both of them as of the March term, 1884, but executions did not issue until some time in the year 1885, according to memoranda which I have it was March 24th, 1885.

In the discussion between Mr. Parlin and myself as to the amount to be paid, the costs in these two suits were included in his statement. We paid the amount which we did pay, not in consequence of any preceding agreement to pay it, but to buy our peace and to save time in the disposition of the foreclosure case.

The foregoing is a true report of the testimony of the said Josiah H. Drummond taken by me on December 9, 1893.

J. A. HAYDEN,
Official Stenographer.

A true copy.

Attest:

B. C. STONE, *Clerk.*

[Seal Sup. Jud. Court, Maine, 1820.]

290 The foregoing cause was heard on bill, answers, and proofs, and was marked "law on report" and continued to await the decision of the law court, which decision, received June 1, A. D. 1895, was as follows, viz:

"Bill sustained, with costs against the trustees, Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, and dismissed as to all the other respondents. Decree in accordance with the opinion."

(The "report" is made a part of this record and may be found on page 1.)

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(*Opinion.*)

SOMERSET RAILWAY	}	In Equity.
<i>vs.</i>		
LEWIS PIERCE and Others.		

Opinion, June 1, 1895.

CUMBERLAND:

Sitting: Peters, C. J.; Walton, Foster, Haskell, Wiswell, Strout, JJ.

STROUT, J.:

On the first day of July, 1871, the Somerset Railroad Company, having a charter for a railroad from a point near Carritunk Falls, in Solon, in the county of Somerset, to the town of Waterville, in

the county of Kennebec, and being on that day possessed of franchises and real and personal estate, for the purpose of building, equipping, and operating such railroad, made a mortgage to Lewis Pierce, Daniel Holland, and Stephen D. Lindsey of the railroad from Waterville to its terminus, in Solon, in the county of Somerset, together with the franchise of the company and all its real estate and all its personal property of every nature used in connection

with its railroad, then possessed or to be thereafter acquired,
 292 in trust to secure the payment of the bonds of said company to an amount not exceeding five hundred thousand dollars, payable in twenty years from the date of the mortgage, with interest at the rate of seven per cent. per annum, according to the coupons annexed to the bonds. Lindsey and Holland, two of the trustees, having deceased, Herbert M. Heath and Franklin M. Drew were duly appointed trustees to fill the vacancies, and they, together with Lewis Pierce, are now the trustees under said mortgage. The Somerset Railroad Company issued and sold bonds secured by the mortgage to the amount of four hundred and fifty thousand dollars only. The company subsequently defaulted on the interest upon the bonds, and for more than three years prior to July 11, 1883, the company had failed to pay the interest on the mortgage bonds and thereby had made a breach of the condition of the mortgage, though the principal of the bonds was not then due. The trustees under the mortgage never entered into possession of the mortgaged property nor took any measures to secure a foreclosure of the mortgage, but the Somerset Railroad Company remained in possession of all the property until the formation of a

new corporation, under the name of the Somerset railway.
 293 On the eleventh day of July, 1883, the holders of the mortgage bonds to an amount largely exceeding one-half of the same elected in writing to form a new corporation, and on the fifteenth day of August, 1883, did form a new corporation, under the name of the Somerset railway, as provided by chapter 51 of the Revised Statutes and acts additional thereto and amendatory thereof, and made the capital stock of the new corporation \$736,648.76, which was made up as follows: \$450,000, amount of outstanding bonds secured by the mortgage as principal, and \$286,648.76, amount of interest upon the bonds due August 15, 1883, and then unpaid.

On the 13th day of July, 1883, the stockholders of the Somerset Railroad Company at its annual meeting voted that the mortgage bondholders organize a new corporation under the statute and take possession of the road at such date as their organization should entitle them to do, and the stockholders also voted at the same meeting to surrender possession of the Somerset Railroad Company to the new corporation. In pursuance of the organization of the new

corporation, and by the consent of the Somerset Railroad
 294 Company, as indicated by the votes of its stockholders, the Somerset railway, on the first day of September, 1883, took possession of the railroad and all other property included in the mortgage, and have ever since held possession of the same and op-

erated the road. The capital stock of the Somerset railway, being the amount of the unpaid bonds and coupons at their face value at the date of the organization of the new corporation, August 15, 1883, was divided into shares of one hundred dollars each, which shares were offered to the mortgage bondholders at the rate of one share of stock for each one hundred dollars of bonds or that amount of coupons due August 15, 1883. Bonds and coupons to amount of \$552,200 have been exchanged for stock in the new corporation, which has been issued, leaving outstanding and unexchanged \$110,600 of mortgage bonds and the coupons thereon.

A decree of strict foreclosure of this mortgage was entered by this court on the first day of April, 1887. On the eighth day of July, 1884, all the right in equity of the Somerset Railroad Company to redeem the mortgage was sold on execution and purchased by the Somerset railway, from which sale no redemption has been had.

295 The trustees under the mortgage have brought suits to recover possession of all the property included in it and mesne profits against various officers and servants of the Somerset railway which are now pending.

The bill prays to have the title and possession of the Somerset railway to the property described in the mortgage declared valid and the mortgage of July 1, 1871, declared void, and the holders of outstanding bonds and coupons ordered to surrender the same in exchange for stock in the Somerset railway, and that the plaintiffs in the suits at law may be enjoined from prosecuting their suits and from disputing the title and possession of the Somerset railway, and for further relief.

That the bill presents a case within the equity jurisdiction is beyond doubt. Revised Statutes of 1871, chapter 51, § 53 and following sections, in force when this mortgage was made, prescribed a method of foreclosure of such mortgages by the trustees on application of one-third of the bondholders in amount; and by section 55 it was provided that such foreclosure should enure to the benefit of all holders of bonds and coupons secured by the mortgage, and that the holders of such bonds and coupons or their successors or

296 assigns become a corporation as of the date of the foreclosure, "for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter," and required the trustees to convey to such new corporation all the right and title they had under the mortgage and its foreclosure. Section 56 provided for calling the first meeting of the new corporation, adopting a name, and authorized the new corporation to take and hold the possession and have the use of the mortgaged property.

These provisions for perfecting the security of the mortgage bondholders and to enable them to realize their debts by operation of law must be treated as part of the mortgage contract, and the rights thereby secured to the bondholders could not be abridged or taken away by subsequent enactments; but it was competent for the law-making power to change the form and method of the bondholders' remedy, provided the new method protected their rights as fully as

that existing when the mortgage was given. *Von Hoffman v. City of Quincy*, 4 Wall., 535; *Seibert v. Lewis*, 122 U. S., 294; *Edwards v. Kearzey*, 96 U. S., 595; *Louisiana v. New Orleans*, 102 U. S., 206.

Without changing the manner of foreclosure provided in 297 R. S. of 1871, c. 51, the legislature in 1876, by chapter 122, gave the benefit of the provisions of chapter 51, from §§ 47 to 70, inclusive, to the holders of all mortgage bonds, whether the mortgage was foreclosed as provided in chapter 51 "or in any other legal manner," and by chapter 53 of the Laws of 1878 §§ 47 to 70 of chapter 51 of R. S. of 1871 were made to apply to and include all such mortgages "in all cases in which the principal of said scrip or bonds shall have been due and payable for more than three years and shall remain unpaid in whole or in part in the same way and to the same extent as if the mortgage had been legally foreclosed," and authorized such bondholders to form a new corporation in the manner provided in chapter 51 of R. S. of 1871, "whenever the holders of such scrip or bonds to any amount exceeding one-half of the same shall so elect in writing." The same statute, in § 2, provided that "capital stock of such new corporation shall be equal to the amount of unpaid bonds and coupons secured by such mortgage, taken at their face at the time of the organization of the new corporation," and by chapter 166, Laws of 1883, the act of 1878 was extended to apply to cases in which "no 298 interest has been paid for more than three years."

The remedy by foreclosure by the trustees, existing when the mortgage of 1871 was given, has never been abridged or taken away, but the subsequent statutes have enlarged and made more efficient the bondholders' remedy; but these enactments did not operate injuriously to the Somerset Railroad Company and are not therefore open to constitutional objection. The trustees had no power to take possession of the mortgaged property, nor to foreclose the mortgage, except directed so to do by a vote of the bondholders, by a majority in value in the one case or one-third in value in the other. R. S. of 1871, c. 51, §§ 49-53. The new provisions in the subsequent acts enabled a majority in amount of the bondholders to act directly without the intervention of the trustees, thus simplifying the proceeding.

The interest upon the mortgage bonds having been unpaid for more than three years prior to July 11, 1883, the bondholders, holding \$351,900 in amount of the bonds secured by the mortgage, on that day elected in writing to form a new corporation in accordance with chapter 51 of the Revised Statutes of 1871 299 as amended by the acts of 1878 and 1883, instead of resorting to a foreclosure by the trustees. It will be noticed that the amendatory acts required the action of a majority in amount of the mortgage bondholders, while the foreclosure by the trustees required the concurrence of only one-third of the amount. The proceedings to organize the new corporation and establish the capital stock under the amendatory acts appear to be in strict conformity thereto, and the new corporation, under the name of the Somerset railway, thereby became a legal corporation on the fifteenth day of

August, 1883, and then became entitled to "take and hold the possession and have the use of the mortgaged property." R. S. 1871, c. 51, § 56. The fact that some holders of mortgage bonds who participated in the organization of the new corporation and voted upon their bonds have since transferred them to other parties not bondholders at the time the Somerset railway was organized cannot affect the status of the corporation. The bonds being once voted are subjected to the consequences of that vote, regardless of whose hands they may subsequently fall into. It is not in the power of a bondholder participating in the formation of a new corporation based upon his bonds with others to destroy the existence of the corporation once legally formed by a subsequent transfer of his bonds to third parties. *Barnes v. Chicago, Milwaukee & St. Paul R. R.*, 122 U. S., 1. The new corporation took possession of the mortgage property on the first day of September, 1883, and has ever since held it and operated the railroad. This action was authorized by the statute, consented to by the Somerset Railroad Company, the mortgagor, actively proposed and aided by one at least of the trustees, and ever since acquiesced in by all the trustees. It is too late for the trustees or dissenting bondholders now to object to technical irregularities, if any exist, especially as the Somerset railway has since extended the railroad from North Anson to Bingham, a distance of about sixteen miles, built a branch railroad of one mile in length of great importance to the productiveness of the main line, placed a mortgage upon the road for \$225,000 to make these extensions and other improvements, and in other ways materially changed the condition and relations of all parties interested in the road. Their long acquiescence, without objection, coupled with the changed conditions and relations resulting from the possession and management of the property by the Somerset railway, estops them from now questioning the legality of the organization of the new corporation. *Kent v. Quicksilver Mining Company*, 78 N. Y., 159; *Zabriskie v. Cleveland Railroad*, 23 How., 395; *Halstead v. Grinnan*, 152 U. S., 412; *Harwood v. Railroad Company*, 17 Wall., 78; *Railroad v. Railroad*, 65 N. H., 400.

The case shows that on July 8, 1884, all the right in equity which the Somerset Railroad Company had to redeem from the mortgage was legally sold on execution to the Somerset railway, from which no redemption was had. It follows that on July 8, 1885, when the time for redemption from the execution sale expired, the Somerset railway, representing all the mortgage bondholders, held the legal and full title to the equity of redemption which the Somerset Railroad Company had before held, and also the equitable, beneficial title under the mortgage, and was in full, entire, and exclusive possession and use of all the property described in the mortgage; and as the trustees had no beneficial interest under the mortgage and held only a dry trust, with no duties to perform under it, they could not interfere with the title or possession of the Somerset railway; it had become the duty of the trustees to release their naked legal title to the Somerset railway—R. S. of 1871, c. 51,

§ 55; and as equity regards that as done which ought to be done, the title of the Somerset railway to all the property described in the mortgage must in equity be regarded as full and complete and will be absolute at law when the trustees release their naked legal title, which they are required to do.

The title thus acquired to the mortgaged property operated as payment of all the bonds secured by the mortgage, if the mortgaged property was of sufficient value over and above the amount paid for the equity of redemption; if not, all the bonds must be regarded as paid *pro tanto* and the balance remains an unsecured debt against the Somerset Railroad Company. But as the life and existence of the Somerset railway was based upon and derived from the mortgage bonds and the corporation was in fact the mortgage bondholders in organization, its title and possession enured to the benefit of all holders of bonds and coupons secured by the mortgage and every

303 bondholder became a shareholder in the property in the proportion the bonds held by him bore to the whole issue under the mortgage. This result follows even if some of the bonds had passed into other hands since the organization of the bondholders in the new corporation and before the title had ripened in that corporation. *Haynes v. Wellington*, 25 Maine, 458; *Jones on Mortgages*, § 950; *Hurd v. Coleman*, 42 Maine, 182; *Hatch v. White*, 2 Gall. C. C., 152.

Any subsequent transfer of the mortgage bonds, unexchanged for stock, operated only as a transfer of the bondholders' share in the property originally conveyed by the mortgage, if the property was of sufficient value to pay all the mortgage bonds and the amount paid for the equity of redemption for the mortgage; if insufficient for that, the transfer of the bonds carried that share as property and the balance of the bonds unpaid by the property as an unsecured debt of the Somerset Railroad Company. *In re Bondholders of York & Cumberland Railroad*, 50 Maine, 564.

But it is claimed that the action of this court in *Anson*, petitioners, 85 Maine, 79, appointing a trustee under the mortgage of July 1, 1871, to fill a vacancy was a decision upon the question involved here, and that the status of the bondholders who have exchanged their bonds for stock of the Somerset railway and the holders of mortgage bonds unexchanged is *res adjudicata*. Not so. The case was a petition for appointment 304 of a trustee to fill a vacancy caused by the death of an original trustee, and the court expressly says: "The rights of the different bondholder are not now to be distinguished, for all the facts which might have a tendency to create differences are not now before us, and any attempt to settle all the conflicting claims suggested by the history of the enterprise would be premature. We do not now to undertake to decide the relative equities between the outstanding bonds and those which were surrendered and cancelled in exchange for the stock of the new corporation, nor to decide the status of the new organization and its new issue of bonds."

The court in that case carefully refrained from determining the rights and powers of the trustees or the rights of the new corpora-

tion or of the mortgage bondholders. It did not have before it a case calling for or authorizing such determination. It was mainly because the questions involved in this suit could not be determined in that that the trustee was appointed to avoid possible delay or confusion in determining the rights of all parties and to
305 afford the means to bring the whole case before the court with no embarrassment from lack of parties.

The mortgage, coupled with the purchase of the equity, has ripened into full title and ceased to have the character of a mortgage. It is now only valuable as a muniment of title which has been perfected in the beneficiaries under the mortgage. There remains no property for the mortgage to operate upon. The trustees hold only a dry trust, without beneficial interest, with no duties to perform except to release and transfer to the Somerset railway the bare legal title which they held under the mortgage, which is now but a cloud upon the title of the Somerset railway. This they must do on payment of any amount that may be due them for services or disbursements. As to them and their office the mortgage is *functus officio*, and they cannot interfere with the title of possession of the Somerset railway, rightfully holding the property as representing the mortgage bondholders.

It appears that in April, 1883, before the formation of the Somerset railway, Reuben B. Dunn and others, holding more than one-half of the entire issue of bonds under the mortgage of July 1, 1871, in behalf of themselves and all other holders of bonds
306 secured by the mortgage, brought a bill in equity in this court, in the county of Kennebec, against the Somerset Railroad Company, praying a decree of foreclosure of this mortgage for breach of condition. The trustees were not made parties to this bill, as they properly should have been, but no objection appears to have been made on that account. A decree was entered in the suit at a term of this court held on the third Tuesday of October, 1884, that if the Somerset Railroad Company should pay the overdue coupons on or before the first day of July, 1885, the complainants should take nothing by their bill, but if not so paid, that the right of redemption should be barred. The amount not being paid at the time mentioned in the decree nor afterward, a final decree of strict foreclosure was entered on the thirty-first day of March, 1887. Revised Statutes of 1871, c. 51, provided a method for foreclosure of railroad mortgages by trustees. Chapter 166 of the Laws of 1883, § 4, provided that where the principal of any bonds issued by a railroad corporation, secured by mortgage, shall have been due and payable more than three years, "or no interest has been
307 paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or, if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds, may commence a suit in equity for the purpose of foreclosing such mortgage, and the court may decree a foreclosure of such mortgage unless the arrears are paid within such time as the court may order."

Aside from the foreclosure proceedings authorized by the trus-

tees, equity furnishes the best, and perhaps now the exclusive, forum for foreclosure of this class of mortgages. The ordinary method of foreclosure of mortgages on real estate is ill adapted to the foreclosure of railroad mortgages. The protection of all the large interests usually involved in the latter may require a receivership or an injunction or an order of sale, none of which can be accomplished by the ordinary proceedings for foreclosure, but can easily be provided for by the flexible processes of equity. The case of *Kennebec & Portland Railroad v. Portland & Kennebec Railroad*, 59 Maine, 1, holding otherwise, was decided when the equity powers of this court were limited and is not applicable under the full equity powers now possessed.

308 When the bill was filed by Dunn and others no corporation of the bondholders had been formed and the bill was properly brought and maintainable under the statute last cited and might have been sustained under the full equity power then existing in this court. Before the final decree was entered all right and title of the Somerset Railroad Company had been divested by the sale of its equity on execution to the Somerset railway, and it had no further interest in the property or the proceedings in the equity suit, and it was therefore unnecessary to continue the equity suit for foreclosure to a final decree; but it was done, perhaps, from extra caution. The Somerset Railroad Company might have complained that the decree limited the right of redemption to a shorter time than the law allowed it under the mortgage, if it had retained any interest in the property. Having parted with its interest, it could not be injured by the decree. The bill being for the benefit of the bondholders and the decree, if valid, operating to perfect their title to the mortgaged property, they can hardly be heard to complain; but whether this decree was valid or not we are not
309 called upon to decide, as we do not deem it material to the determination of the rights of these parties.

When the new corporation was formed and took possession of all the mortgaged property and acquired the right of redemption from the mortgage from the Somerset Railroad Company, all the holders of the bonds secured by the mortgage then became shareholders in the property, to which they then had the entire title and beneficial interest. The capital of the new corporation was exactly the amount of the outstanding bonds and coupons secured by the mortgage. This corporation proposed to issue its stock to the holders of bonds and coupons upon surrender of the bonds and coupons, at the rate of one share of stock, of the par value of one hundred dollars, for the same amount in bonds and coupons. This proposition has been accepted and acted upon by the holders of bonds and coupons to the amount of \$552,200, leaving outstanding bonds to the amount of \$110,600 and the unpaid overdue coupons thereon. This exchange of bonds for stock does not lessen or enlarge the rights of the holders of unexchanged bonds. They were all paid, so far as the value of the mortgaged property in excess of amount paid for the equity of redemption was sufficient
310 to do so; and thenceforward the bonds, so far as paid, be-

came evidence of the amount of interest the holder had in the railroad property and not of a debt, the balance only being evidence of a debt for such balance. The Somerset railway stood in the place of and represented all the mortgage bondholders. Its stock, when issued in exchange for bonds, practically represented the bondholders' share in the property. The unexchanged bonds represented the same and no more. The Somerset railway can only issue its stock in exchange for mortgage bonds and coupons. It cannot sell and issue it to other parties. If any bondholder declines ultimately to exchange his bonds for stock, an amount of stock of the company equal to such bonds cannot be issued at all. The capital stock of the railway represents the bonds and stands for them.

It was and is optional with the bondholder to exchange his bonds for stock. He cannot be compelled to do so. The Somerset railway, representing all the mortgage bondholders and being simply the bondholders in organization, is entitled to hold, possess, and operate the property. Its net earnings, when distributed in
 311 the form of dividends or otherwise, must be distributed to its stockholders and to the holders of unexchanged bonds in equal proportions.

If the holders of unexchanged bonds choose to take stock, they can do so at any time, or if they choose they can retain their present position and receive their share of the net earnings *pro rata* with the stockholders. If they become dissatisfied with this position and decline to take stock, upon a proper bill and sufficient equitable cause shown they may have partition of the property as between equitable tenants in common, if practicable, or if that is impracticable, as it probably would be, a decree of sale of the railroad property, subject to legal incumbrances, and division of the proceeds on the basis of taking the entire amount due on the \$450,000 of bonds and unpaid coupons at the date of the organization of the new corporation and apportioning the proceeds *pro rata* among the holders of stock in the railway and the outstanding unexchanged bonds, thus doing exact justice to all. *Pomeroy's Equity*, §§ 1388, 1389, 1390; *Nash v. Simpson*, 78 Maine, 142.

It appears that the Somerset railway on the first day of October, 1887, for the purpose of extending and improving the road and its equipment, made a mortgage of its entire property to trust-
 312 tees to secure the payment of its bonds to the amount of two hundred and twenty-five thousand dollars, all of which have been issued, sold, and are now outstanding, the proceeds being used in extending and improving the road. The mortgage of July 1, 1871, having exhausted its office and become inoperative as an existing mortgage, by union of the legal right of redemption and the equitable beneficial title under the mortgage to all the property described therein in the Somerset railway, representing all the mortgage bondholders, the mortgage for \$225,000 has become the first mortgage upon the road and its property. Whether the property was sufficient to pay the mortgage debt of July 1, 1871, or not, there is nothing more for it to operate upon.

The trustees must release and convey whatever title and interest may be in them to the Somerset railway on payment of any amount that may be due them for services and disbursements; a master to be appointed to ascertain and report the amount.

The trustees, Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, must be perpetually enjoined from the further prosecution of their pending suits and from interfering in any way with the title, possession, or use by the Somerset railway of any and all the property described in the mortgage of July 1, 1871, except so far as it may be necessary for them by suitable legal process to enforce any lien, if any, which they may have upon the property for the payment of such sums as may be found due them for services and disbursements as such trustees, and the trustees must be commanded and enjoined to release and convey to the Somerset railway all right and title they hold as trustees under the mortgages of July 1, 1871, upon payment of their charges.

Bill sustained, with costs, against the trustees, Pierce, Heath, and Drew, and dismissed as to all the other respondents. Decree in accordance with this opinion.

A true copy of opinion as taken from Maine Reports, vol. 88, page 86 *et seq.*

[Seal Sup. Jud. Court, Maine, 1820.]

Attest:

B. C. STONE, *Clerk.*

314 (Decree.)

CUMBERLAND, 88:

Supreme Judicial Court, October Rules, 1895.

SOMERSET RAILWAY	} In Equity.
vs.	
LEWIS PIERCE <i>et al.</i>	

This cause came on to be heard on bill, answer, and proofs; and thereupon, it appearing that questions of law were involved of sufficient importance or doubt to justify the same and the parties agreeing thereto, it was reported to the law court, where it was argued by counsel at the July term of said court, 1894; and thereafterwards, upon full consideration, said law court sent down its mandate in the cause, and, in accordance therewith, it is now ordered, adjudged, and decreed—

1. That the bill be sustained, with costs, against Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees under the mortgage referred to in the bill, and be dismissed as to all other respondents.

2. That the complainant, The Somerset Railway, is a corporation legally organized on the fifteenth day of August, A. D. 1883, under the statutes of this State, by the holders of bonds secured by the mortgage given by the Somerset Railroad

Company, dated July 1, A. D. 1871, and represents all holders of such bonds.

That said Somerset railway, peaceably and without objection and by consent of the Somerset Railroad Company, the mortgagor, on the first day of September, A. D. 1883, took possession of the railroad and all property and rights included in and conveyed by said mortgage and ever since has held possession of the same uninterruptedly and operated the railroad, and on the eighth day of July, A. D. 1884, acquired by purchase on execution sale the right of redemption from said mortgage, then existing in the Somerset Railroad Company, from which sale no redemption was made, and that the Somerset railway now has sufficient title to all the mortgaged property and rights to entitle it to hold the possession and use of the same against said Pierce, Heath, and Drew, trustees under said mortgage, and is entitled to receive from said trustees a release of all title now in them under said mortgage.

316 3. That the title to the mortgaged property acquired by the Somerset railway, now and when perfected by a release from the trustees, is and will be held by it for the benefit of all holders of bonds and unpaid coupons secured by said mortgage equally in proportion to their several holdings, whether such holders have exchanged their bonds for stock in the Somerset railway or not; and such holders are all entitled, as shareholders in the property, to an equal proportional distribution of the net earnings of the Somerset railway when the same are distributed, as dividends or otherwise.

4. That each holder of bonds or coupons secured by said mortgage of July 1, A. D. 1871, may at any time surrender them to said Somerset railway in exchange for its capital stock, at the rate of one share of stock for the same amount of bonds and coupons unpaid on the fifteenth day of August, A. D. 1883.

5. That the possession and title to all the property conveyed by said mortgage being in the Somerset railway, representing the holders of all bonds and coupons secured by said mortgage, such bonds and coupons are thereby paid, if the property was of sufficient value therefor on the eighth day of July, A. D. 1885, when its title to the right of redemption from said mortgage became absolute; 317 if otherwise, they are paid *pro rata* to the extent of such value.

6. That said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees, are commanded and enjoined, upon payment to them of any amount that may be due them for services and disbursements as such trustees, to release and convey, by suitable deed, to the Somerset railway all the title and interest they may have as trustees under said mortgage of July 1, A. D. 1871, in and to the property therein described, a master to be appointed to ascertain and report what sums, if any, are due respectively to said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew for services and disbursements as trustees aforesaid.

7. That said trustees, Lewis Pierce, Herbert M. Heath, and Franklin Drew, are perpetually enjoined from further prosecution of the

suits at law set out in the complainant's bill, now pending in the supreme judicial court, in the counties of Kennebec and Somerset, in the names of said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, as plaintiffs, and against John Ayer and others, 318 defendants, and from interfering in any way with the title, possession, or use by the Somerset railway of any and all the property described in the mortgage of July 1, A. D. 1871, aforesaid, except so far as may be necessary by suitable legal process to enforce any lien, if any they have, upon said property for the payment of their services and disbursements as such trustees.

8. That execution issue for costs against said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew.

SEWALL C. STROUT,

Justice S. J. Court.

A true copy of decree.

[Seal Sup. Jud. Court, Maine, 1820.]

Attest :

B. C. STONE, *Clerk.*

319 STATE OF MAINE, } ss :
Cumberland,

CLERK'S OFFICE, SUPREME JUDICIAL COURT, PORTLAND.

In testimony that the foregoing is a true transcript of the record in the cause "Somerset Railway, in equity, *versus* Lewis Pierce *et als.*"

I make this certificate and hereunto set my name and affix the official seal of the court
Seal Sup. Jud. Court, Maine, 1820. aforesaid this twelfth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

B. C. STONE,

Clerk of all the Judicial Courts in the County Aforesaid.

STATE OF MAINE, } ss :
Cumberland,

I, John A. Peters, chief justice of the supreme judicial court of the State of Maine, hereby certify that B. C. Stone, Esq., whose signature is above affixed, is clerk of the supreme judicial court of said State for the county of Cumberland, and is by law the proper person to make out and certify copies of all records and proceedings of said court holden within and for said county of Cumberland, and that full faith and credit is and ought to be given to his acts and attestations done as aforesaid, and that his attestation is in due form of law.

In testimony whereof I have hereunto set my hand and the seal of said court this twelfth day of May, anno Domini one thousand eight hundred and ninety-six, and in the one hundred and twentieth year of the Independence of the
Seal Sup. Jud. Court, Maine, 1820. United States of America.

JOHN A. PETERS.

320 In the Supreme Court of the United States, October Term,
1895.

LEWIS PIERCE & <i>als.</i> , Trustees & Mortgagees, Plaintiffs in Error, <i>v.</i> THE SOMERSET RAILWAY.	}	In Error to the Supreme Court of Maine, County of Cumber- land.
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Assignment of Errors.

1. The learned court of Maine erred in holding and deciding that the rights of these trustees and mortgagees and of the bondholders whose interest they represent could be taken away and destroyed by a new corporation created under legislative acts subsequent to the date of the mortgage of July 1, 1871, and not authorized by any law then in existence or by the terms of the mortgage contract, and erred in holding that such new corporation could, under and by force of such subsequent legislation, acquire and hold said mortgage property without payment of said mortgage debt.

2. The learned court erred in holding that a new corporation could be legally formed under said mortgage of July 1, 1871, and acquire the title to said mortgage property otherwise than in strict conformity with the terms of the mortgage and the laws in force at the time of its execution.

3. The learned court erred in holding that any of the proceedings offered in proof constituted a legal foreclosure of the
321 mortgage, and erred in holding that there could be any such legal foreclosure except in accordance with the laws in force at the date of said mortgage, and erred in holding that a foreclosure could, under subsequent legislation, vest the legal title to the property in a new corporation and divest the title of said trustees.

4. The learned court erred in holding that such new corporation could purchase the right of redeeming the mortgage of July 1, 1871, and, without paying the debt secured by it or any part of it and without any foreclosure of the mortgage in accordance with the laws in force at its date, acquire full title to the mortgage property and thereby deprive said trustees of the same, thus impairing their rights under the mortgage contract and the rights of the minority bondholders & destroying the same.

5. The learned court erred in holding that the acts of the legislature of Maine subsequent to the mortgage could enlarge the power of the majority of the bondholders over the rights of the minority or over the rights of any bondholder, as such rights existed at the date of the contract.

6. The plaintiffs in error allege that there was an implied agreement and contract by the bondholders not only with said trustees, but also as between themselves, that all the terms and stipulations of the mortgage contract should be carried out, and that the

322 rights of every bondholder, so secured by such terms and stipulations and by the laws then in force, should be pro-

tected and enforced as therein provided in case a resort to the mortgage property should become necessary for the payment of said bonds; that the acts of such bondholders as attempted subsequently to form a new corporation not authorized by the mortgage or by the laws in force at its date, in order to get possession of the mortgage property, were in violation of such implied agreement and contract; and the learned court erred in sustaining such acts and holding them valid because authorized by subsequent State legislation, by reason of all which the rights of the trustees and of the other bondholders under said mortgage contract and their title to said mortgage property have been substantially impaired and destroyed.

7. The plaintiffs in error further show that their rights and the rights of the bondholders whom they represent, in case of a foreclosure of said mortgage under the laws in force at its date, would be materially different from any rights which would accrue to them in case of a foreclosure under such subsequent acts of legislation, and far more valuable, and that the learned court of Maine erred in sustaining such subsequent legislation and the attempted foreclosure under it, thereby impairing the obligation of the mortgage contract.

8. They further show that one of the terms and stipulations of the mortgage of July 1, 1871, specifically provided that the trustees in said mortgage should be the sole judges in the first instance whether any breach of the conditions of the mortgage had taken place such as would justify a foreclosure of said mortgage or justify taking possession of the mortgage property, and that the learned court erred in holding that any foreclosure of the mortgage could be legally valid without such action, determination, and judgment, in the first instance, of said trustees, and erred in refusing to give any effect to such provision in said mortgage contract, thereby impairing its obligation.

9. The learned court erred in holding that the first-mortgage bonds and the mortgage itself, of July 1, 1871, had been extinguished by force of subsequent legislative acts and the proceedings thereunder appearing in proof, without payment of the debt thereby secured, and that the new bonds, issued many years afterwards but before said bonds of July 1, 1871, became due under an alleged second mortgage upon the same property by the aforesaid Somerset railway, had become a prior lien thereon and taken precedence of said first-mortgage bonds, and the plaintiffs in error show that by such holding, decision, and decree in the suit aforesaid the rights of said plaintiffs and of said bondholders under the mortgage contract of July 1, 1871, have been impaired and wholly destroyed.

10. The plaintiffs in error therefore most respectfully pray that the decree of the learned supreme court of Maine in the suit aforesaid may for the errors aforesaid be reversed.

By D. D. STEWART AND
N. & H. B. CLEAVES,
Their Solicitors and Attorneys.

A true copy of assignment of errors.

Attest:

B. C. STONE, *Clerk.*

[Seal Sup. Jud. Court, Maine, 1820.]

Endorsed on cover: Case No. 16,308. Maine supreme judicial court. Term No., 531. Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees, plaintiffs in error, *vs.* The Somerset Railway Company. Filed May 23rd, 1896.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 222. *ARA* 13.

LEWIS PIERCE, HERBERT M. HEATH, AND FRANKLIN
M. DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS
IN ERROR.

vs.

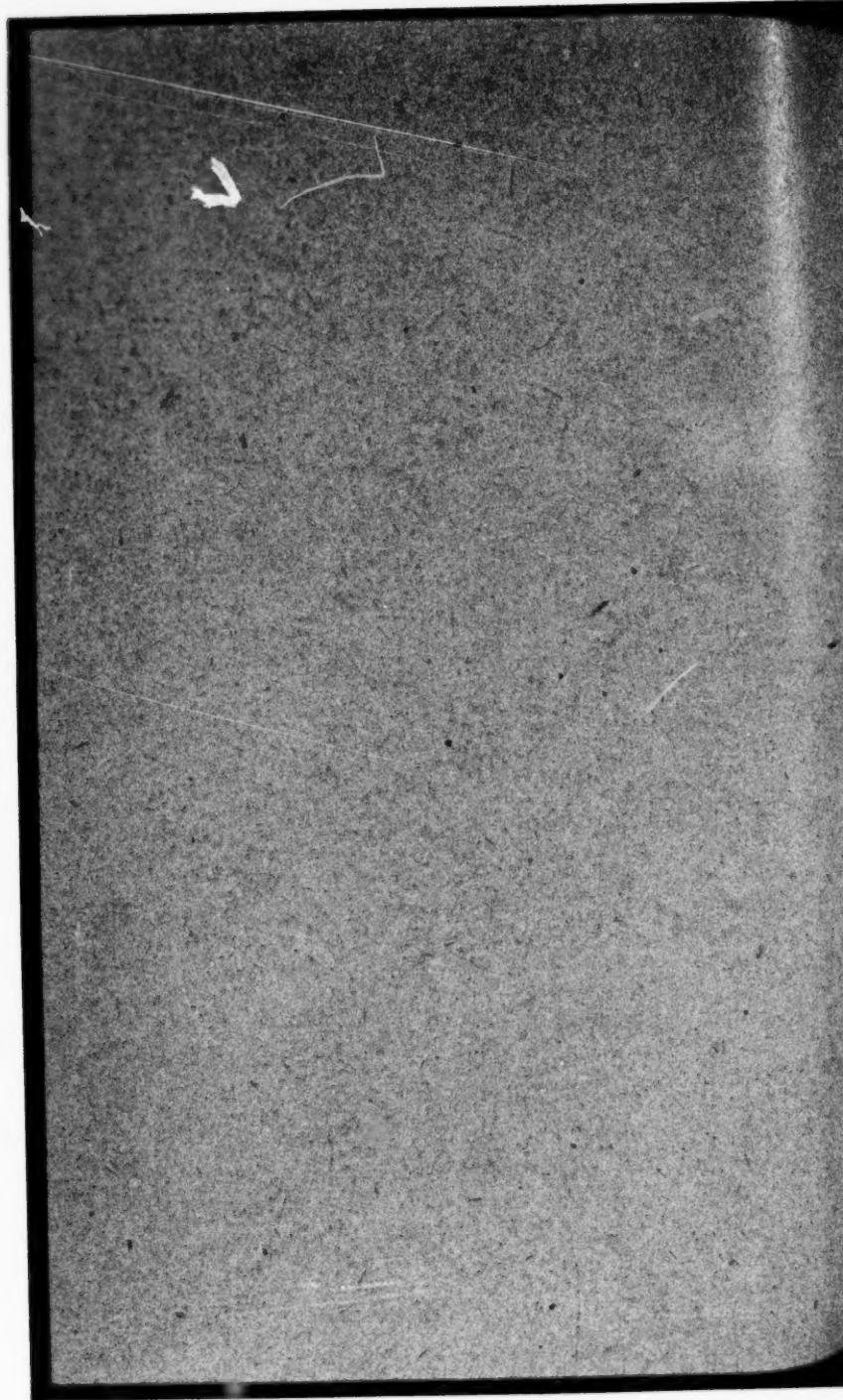
JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE
W. GREELEY, FRANKLIN MERRILL, H. A. BURRILL,
AND D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF
MAINE.

FILED MAY 23, 1896.

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(16,309.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 532.

LEWIS PIERCE, HERBERT M. HEATH, AND FRANKLIN
M. DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS
IN ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE
W. GREELEY, FRANKLIN MERRILL, H. A. BURRILL,
AND D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF
MAINE.

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1 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the honorable the judges of the supreme judicial court of the State of Maine, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of said State of Maine, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Lewis Pierce, of Portland, in the county of Cumberland; Herbert M. Heath, of Augusta, in the county of Kennebec, and Franklin M. Drew, of Lewiston, in the county of Androscoggin, citizens of said State and trustees and mortgagees under a certain mortgage deed executed by the Somerset Railroad Company, a corporation duly incorporated under the laws of Maine on July 1, 1871, to secure the payment of certain bonds issued by said railroad company and sold in the public market for value, plaintiffs, and John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, and H. A. Burrill, all of Oakland, in the county of Kennebec, and D. L. Foster, of Bingham, in the county of Somerset, citizens of said State of Maine, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause

2 of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees and mortgagees as aforesaid, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller,
Seal of the Circuit Chief Justice of the United States, the eighteenth
Court, Maine. day of April, in the year of our Lord one thou-
sand eight hundred and ninety-six.

A. H. DAVIS,

*Clerk of the Circuit Court of the United States for the
First Circuit, Maine District.*

Allowed by—

JOHN A. PETERS,

*Chief Justice of the Supreme
Judicial Court of Maine.*

April 18, 1896.

3 [Endorsed:] Writ of error. Lewis Pierce & als., trustees,
plaintiffs in error, v. John Ayer & als.

4 STATE OF MAINE, }
County of Kennebec, } ss:

And now, here, the judges of the supreme judicial court for and within the county aforesaid make return of this writ of error by annexing hereto and sending herewith, under the seal of the said supreme judicial court of said State of Maine, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, within thirty days after the service of said writ of error upon them, as within commanded.

In testimony whereof I, Winfield S. Choate, clerk of said supreme judicial court, have hereunto set my hand and the seal of said court this 13th day of May, A. D. 1896.

[Seal Sup. Jud. Court, Maine, 1820.]

WINFIELD S. CHOATE, *Clerk.*

5 To the Hon. John A. Peters, chief justice of the supreme
judicial court of the State of Maine:

The petition of Lewis Pierce, of Portland, in the county of Cumberland; Herbert M. Heath, of Augusta, in the county of Kennebec, and Franklin M. Drew, of Lewiston, in the county of Androscoggin, all in the State of Maine and citizens of said State, respectfully shows that your petitioners are trustees and mortgagees in a mortgage duly executed by the Somerset Railroad Company on July 1, 1871, to secure the payment of certain bonds issued by said railroad company and sold in the public market, payable in twenty years, to wit, on July 1, 1891, with interest at seven per cent. per annum, of which said issue of bonds so as aforesaid sold \$110,600.00 are still outstanding and unpaid.

Your petitioners further show that in the record and proceedings and also in the judgment rendered in a suit before the supreme judicial court of said State of Maine, sitting for and within the county of Kennebec aforesaid, in which suit your petitioners, as such trustees

and mortgagees, are plaintiffs and John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill, and D. L. Foster are defendants, there is drawn in question the validity of certain statutes of the State of Maine, on the ground of their being repugnant to the Constitution of the United States, because impairing the obligation of the contract contained in the mortgage and bonds aforesaid, and the decision is in favor of the validity of said statutes of said State and against the immunity claimed by your petitioners under the Constitution of the United States.

6 And your said petitioners further show that said suit is an action at law, a writ of entry under the law of the State of Maine, brought by said petitioners, as trustees and mortgagees under the mortgage aforesaid, to recover possession of the real estate, railway, depots, fixtures, and rolling stock of said Somerset Railroad Company situate in said county of Kennebec and embraced in said mortgage, of which the said John Ayer & *als.* had unlawfully disseized the said trustees and mortgagees, and that final judgment therein was rendered against your petitioners as such trustees and mortgagees on or about June 3, 1895, by said supreme judicial court of said State of Maine, which is the highest court of record and the court of last resort in said State.

That said judgment, as already shown, involved a Federal question, and that the decision thereof is in favor of the State laws and against the immunity and protection claimed by your petitioners as trustees and mortgagees under the Constitution of the United States.

Wherefore your petitioners (presenting herewith a bond with security for approval) pray that a writ of error may be allowed to issue to said supreme judicial court of said State of Maine to bring up the record in said suit to the Supreme Court of the United States for correction in that which violates the Constitution of the United States, and that the citation authorized by the laws of the United States may accompany the same.

Portland, March 2, 1896.

LEWIS PIERCE.
HERBERT M. HEATH.
FRANKLIN M. DREW.

7 The within petition for the allowance of a writ of error was presented to me on April 18th, A. D. 1896, and allowed, citation to issue as prayed for.

JOHN A. PETERS,
Chief Justice of the Supreme Judicial Court of Maine.

STATE OF MAINE, }
Kennebec County, } ss:

Sup. Jud. Court.

A true copy of the original petition on file in this office.

[Seal Sup. Jud. Court, Maine, 1820.]

Attest: WINFIELD S. CHOATE, *Clerk.*

8 Know all men by these presents that we, Lewis Pierce, of Portland; Herbert M. Heath, of Augusta, and Franklin M. Drew, of Lewiston, all citizens of the State of Maine and trustees, as principals, and John M. Robbins, Alonzo Garcelon, C. I. Barker, and T. R. Herbest, all of said Lewiston, *cestuis que trust.* under the mortgage deed appointing the above trustees, as sureties, are held and firmly bound unto John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, and H. A. Burrill, all of Oakland, in the county of Kennebec, and D. L. Foster, of Bingham, in the county of Somerset, all citizens of said State, in the full and just sum of five hundred dollars, to be paid to the said John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill, and D. L. Foster, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the supreme judicial court of the State of Maine within and for the county of Kennebec, on or about June 3, 1895, in a suit depending in said court between the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees and mortgagees, plaintiffs, and said John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill, and D. L. Foster, defendants, a judgment was rendered against the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, and the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the afore-

9 said suit, and a citation directed to the said John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill, and D. L. Foster, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LEWIS PIERCE.	[L. S.]
HERBERT M. HEATH.	[L. S.]
FRANKLIN M. DREW.	[L. S.]
JOHN M. ROBBINS.	[L. S.]
ALONZO GARCELON.	[L. S.]
C. I. BARKER.	[L. S.]
T. R. HERBEST.	[L. S.]

Sealed and delivered in presence of—

HENRY B. CLEAVES.

H. C. RECORD.

ADDISON SMALL,

To J. M. Robbins, A. Garcelon, & C. I. Barker.

Approved by—

JOHN A. PETERS,

Chief Justice of the Supreme Judicial Court of Maine.

April 18, 1896.

Seal Sup. Jud. Court, Maine, 1820. A true copy of the original bond on file in the office of the clerk of the sup. jud. court, Kennebec county, State of Maine.

Attest:

WINFIELD S. CHOATE, *Clerk.*

10 UNITED STATES OF AMERICA, ss:

To John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill, and D. L. Foster, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of the State of Maine, wherein Lewis Pierce, Herbert M. Heath, and Franklin M. Drew are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN A. PETERS,

Chief Justice of the Supreme Court of the State of Maine.

Service acknowledged, see other side.

11 [Endorsed:] Citation on writ of error. Lewis Pierce & *als.*, trustees, v. John Ayer & *als.*

APRIL 24, 1896.

Service of the within citation is hereby acknowledged and accepted.

EDMUND F. WEBB,

Counsel for Defendants in Error.

12 STATE OF MAINE, }
Kennebec, } ss:

At the supreme judicial court begun and holden at Augusta, within and for the county of Kennebec, on the first Tuesday of March, being the fifth day of said month, anno Domini 1895, by the Hon. Andrew P. Wiswell, a judge of said court.

The Hon. Wm. P. Whitehouse, a judge of said court, held this term the 3rd, 4th, 5th, 6th, and 20th days, and in No. 53 on the 12th day.

LEWIS PIERCE, of Portland, in the County of Cumberland; Herbert M. Heath, of Augusta, in said County of Kennebec, and Franklin M. Drew, of Lewiston, in the County of Androscoggin, Trustees and Mortgagees under the Mortgage Executed on July 1, 1871, by the Somerset Railroad Company, a Corporation Duly Existing by Law, which said Mortgage is Duly Recorded in the Registry of Deeds for the County of Kennebec, in Vol. 290, Page 319, Plaintiffs, } 116.

VS.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE W. Greeley, Frank Merrill, and H. A. Burrill, all of Oakland, in the County of Kennebec, and D. L. Foster, of Bingham, in the County of Somerset, Defendants. }

In a plea of land, wherein the said trustees, the plaintiffs, demand against the defendants aforesaid, as disseizors, the possession of the railroad, road-bed, real estate, stations, depots, depot lots and
13 buildings thereon, fixtures, bridges, fences, rolling stock, including engines, locomotives, and cars, of said Somerset Railroad Company, situate in said Oakland, in said county of Kennebec, and extending from the north line of said county, which is the north line of said Oakland, southerly to the depot of said Somerset Railroad Company in the village of said Oakland, and including said depot and depot lot and building thereon, said railroad being four rods wide, and including all lands within the fences on both sides thereof from the north line of said county to and including said depot and depot lot and buildings, a distance of six miles, more or less, with all stations or depots and depot lots and buildings and bridges and fixtures and rolling stock, including engines, locomotives, and cars, upon, along, and connected with said railroad as now used and operated by said defendants, whereof the said defendants unjustly and without judgment disseized the said trustees, the plaintiffs, within twenty years now last past.

Whereupon the said trustees say that they were lawfully seized of the demanded premises and property above named and described, with the appurtenances and fixtures, in their own demesne as of fee and in trust under and by virtue of the mortgage aforesaid, to which they refer as the source and origin of their title to all the above-described property, within twenty years now last past, and ought now to be in quiet possession thereof, but the said defendants unlawfully and wrongfully disseized them of the same and still unlawfully keep them out and withhold the same; and said trustees further demand the sum of ten thousand dollars yearly for the last
14 six years, making sixty thousand dollars in all, as the net rents, profits, and income which the said defendants have wrongfully received from the premises and property herein demanded and have converted the same to their own use; and the plaintiffs further aver that said Lewis Pierce is one of the original trustees and mortgagees to whom said mortgage was given by said Somerset Railroad Company, and said Herbert M. Heath and Frank-

lin M. Drew have been appointed trustees by the supreme judicial court of Maine, sitting in equity, to fill vacancies caused by the decease of Stephen D. Lindsey and Daniel Holland, the other trustees and mortgagees originally named.

All of which is to the damage of the said plaintiffs (as they say) the sum of ninety thousand dollars, which shall then and there be made to appear, with other due damages. Writ dated December 3rd, 1892.

This action was commenced for and entered at the March term, 1893, of this court in this county, when and where the defendants appeared by their attorneys, and Franklin Merrill, D. L. Foster, and H. A. Burrill on the second day of said term filed pleadings as follows:

And now Franklin Merrill, one of said defendants, comes and defends, &c., when, &c., and says that he is not guilty of disseizing the demandants in manner and form as they have above declared against him, and thereof put himself upon the country.

By WEBB, JOHNSON & WEBB,
His Att'ys.

15 And for a brief statement of his defence he says:

That at the commencement of this action he was not tenant of the freehold of the demanded premises, either severally or jointly with the other defendants or any of them, and disclaims any right, title, or interest therein, and denies that he has ever ousted the demandants from the demanded premises or withheld the possession thereof from them.

By WEBB, JOHNSON & WEBB,
His Attorneys.

And now D. L. Foster, one of said defendants, comes and defends, &c., when, &c., and says that he is not guilty of disseizing the demandants in manner and form as they have above declared against him, and thereof puts himself upon the country.

By WEBB, JOHNSON & WEBB,
His Att'ys.

And for a brief statement of his defence he says:

That at the commencement of this action he was not tenant of the freehold of the demanded premises, either severally or jointly with the other defendants, or any of them, and disclaims any right, title, or interest therein, and denies that he has ever ousted the demandants from the demanded premises or withheld the possession thereof from them.

By WEBB, JOHNSON & WEBB,
His Att'ys.

16 And now H. A. Burrill, one of said defendants, comes and defend-, &c., when, &c., and says that he is not guilty of disseizing the demandants in manner and form as they have above declared against him, and thereof puts himself upon the country.

By WEBB, JOHNSON & WEBB, *His Att'ys.*

And for a brief statement of his defence he says:

1. That at the time of the commencement of said action he was not tenant of the freehold of the demanded premises jointly with said other defendants or any of them, and disclaims any title, right, or interest therein.

2. That at the time of the commencement of said action he was in possession of the station, buildings, and grounds at Oakland, in said county, parcel of said demanded premises, as the servant of the Somerset railway, a corporation lawfully existing under the laws of the State, and only as such servant, and that as to the residue of said demanded premises, except said station, buildings, and grounds at said Oakland, he was not at the time of the commencement of said action and never since has been and is not now in possession thereof, and he disclaims all right, title, or interest therein.

By WEBB, JOHNSON & WEBB, *His Att'ys.*

17 Thence the case was continued to the October term, 1893, when and where the defendants John Ayer, William M. Ayer, A. R. Small, and Horace W. Greeley filed a plea as follows:

(Plea. Filed Jan. 29th, 1894.)

And now the said John Ayer, William M. Ayer, A. R. Small, and Horace W. Greeley come and defends, &c., when, &c., and say that they are not guilty of disseizing the demandants in manner and form as they have above declared against them, and thereof put themselves upon the country.

By WEBB, JOHNSON & WEBB &
DRUMMOND & DRUMMOND,

Their Att'ys.

And the case was marked law on report.

Report.

Supreme Judicial Court, Kennebec County, Oct. Term, 1893.

LEWIS PIERCE & *als.* }
vs. }
JOHN AYER & *als.* }

Writ of entry to recover that portion of the road-bed, railroad, rolling stock, and appurtenances of the Somerset Railroad Company situate in Oakland, in said county, being all that part of said railroad and appurtenances situate in the county of Kennebec, a similar writ of entry being brought at the same time in the supreme judicial court of Somerset county to recover that part of said railroad and its appurtenances situate in said Somerset county.

18 Writ dated December 3rd, 1892, and to be copied as part of the case. Pleadings of defendants to be copied as part of the case.

The plaintiffs' title arises under the mortgage given by the Som-

erser Railroad Company on July 1, 1871, to Lewis Pierce, Daniel Holland, and Stephen D. Lindsey, duly recorded in the registries of both counties. Mortgage and record thereof, as copied in the equity suit hereafter named, makes part of the case. It is admitted that Stephen D. Lindsey died on April 28th, 1884, and Daniel Holland on May 5th, 1890; that in August, 1890, proceedings were commenced by the town of Anson and others in the supreme judicial court, in equity, sitting in the county of Kennebec, for the appointment of new trustees to fill the vacancies existing under said mortgage by the deaths of said Lindsey and said Holland, of which notice was duly given, and the Somerset railway and its trustees, E. F. Webb and E. R. Drummond, appeared and filed demurrers and at the same time answers to the bill in equity of said town of Anson and others; that evidence was taken by the respective parties, and the case was reported to the law court, which sustained the bill and directed the appointment of trustees at *nisi prius*, and that at the October term of the supreme judicial court, 1892, in Kennebec county, said Herbert M. Heath was duly appointed a trustee under said mortgage of July 1, 1871, in place of said Stephen D. Lindsey, and said Franklin M. Drew as trustee in place of said Daniel Holland under said mortgage; the final decree of the court

19 appointing said new trustees to be copied as part of the case, and the opinion of the law court directing such appointment may be referred to. Conveyance was made by Lewis Pierce in accordance with the decree. These writs of entry were brought by said trustees to recover said railroad property at the next terms of court in each of said counties following their appointment, as aforesaid, against the persons claimed by said trustees to be found in the actual possession and control of said road. The plaintiffs' counsel are in possession of bonds issued under the mortgage of July 1, 1871, amounting to \$74,800.00, owned by the parties defendant in the equity suit, as appears therein, with the coupons annexed, and it is admitted that there are in all \$110,600 of such bonds still outstanding and unpaid. If the plaintiffs are entitled to recover conditional judgment only in said writs of entry, they claim to recover for said \$110,600 of bonds and the amount due on the coupons thereon and no more. If they are entitled to a judgment at common law, the amount of damages for rents, profits, and income is to be assessed at *nisi prius*.

If not entitled to neither form of judgment, then judgment is to be entered for defendants, or such other judgment as the court shall direct.

The facts and evidence in the suit in equity brought by the Somerset railway against said Lewis Pierce & *als.*, now pending in the supreme judicial court, Cumberland county, and reported to
20 the law court to be held in that county at its July term, 1894, and to be argued at that term, make a part of the evidence in this suit, so far as legally admissible for either party, and upon such other evidence as either party may take and file, if legally admissible, and this suit is to be entered and argued at the same term and time as said equity suit, and such judgments are to be entered

in both suits upon so much of the evidence as may be legally admissible as shall be in accordance with the law of the cases and the legal rights of the parties, the judgment in the action at law to be subject, so far as the court may determine, to any decree in the equity suit, the suit in Somerset county to abide the result of the suit and to be so entered on that docket.

WM. P. WHITEHOUSE,

Justice Presiding.

The final decree of the court appointing said new trustees is as follows:

Decree.

OCTOBER 25TH, 1892.

This cause came on to be further heard at this term of said court upon this the seventh day of said term; and it appearing to the court here that the Somerset Railroad Company, the original mortgager under the above mortgage, has been duly made a party defendant and has appeared and filed an answer similar in substance to that already filed by the Somerset railway, which has been
 21 heard and overruled by the law court; and it also further appearing to the court now here that Lewis Pierce, the only surviving mortgagee in the above mortgage, has been made and admitted to become, upon his own petition, a party plaintiff jointly with the other petitioners asking for the appointment of trustees under said mortgage, all of which is in accordance with the opinion and direction of the law court aforesaid, and the several parties appearing and in interest being represented by counsel and their proofs and arguments being fully heard and considered, it is thereupon ordered, adjudged, and decreed that Herbert M. Heath, of Augusta, in the county of Kennebec, be, and he hereby is, appointed a trustee under the mortgage aforesaid, described in the petition or bill in equity in this cause, in place of Stephen D. Lindsey, one of the original mortgagees under said mortgage, now deceased, and that Franklin M. Drew, of Lewiston, in the county of Androscoggin, be, and he hereby is, appointed a trustee under said mortgage in place of Daniel Holland, one of said original mortgagees, now deceased; and it is also hereby further ordered, adjudged, and decreed that the said Lewis Pierce, the only surviving original trustee under said mortgage, be directed and required to release and convey by suitable deed or deeds one undivided third joint interest, right, and title in all of the property conveyed to the trustees under said mortgage of July 1, 1871, and all now vested in him, to each
 22 of the new trustees hereby appointed, to wit, one joint undivided third part of said property to said H. M. Heath, and one joint undivided third part to said F. M. Drew, so that upon the due execution of said conveyances to said new trustees they, the said Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, shall be fully vested with all the same powers, rights, and duties as if they had originally been appointed trustees under said mortgage.

And it is further ordered, adjudged, and decreed that the peti-

tioners or complainants in this bill recover their costs of the same against the Somerset railway and Edmund F. Webb and Everett R. Drummond, trustees of said Somerset railway, to be taxed as in suits at law, and execution in same form as in suits at law to issue therefor jointly against the said Somerset railway and the said Webb and Drummond.

WM. P. WHITEHOUSE,
Justice Supreme Judicial Court, Presiding.

Thence the action was continued from term to term to this term; and now in this term an order is received from the law court (received June 3rd, 1895) to enter in said action "judgment for defendants." Accompanying said order is the following rescript:

Rescript.

This is a writ of entry. On July 1, 1871, the Somerset Railroad Company made a mortgage of its franchise and railroad property to trustees to secure the payment of bonds. The trustees under the mortgage bring this suit to recover possession of all the property embraced in that mortgage. It is brought against various servants and officers of the Somerset railway. The conditions of the mortgage having been broken, the mortgage bondholders in 1883 organized a new corporation under the statute by the name of the Somerset railway, and that corporation, in accordance with the statute, took possession of all the mortgaged property on the first day of September, 1883, and has ever since retained possession and operated the road.

On the eighth day of July, 1884, it purchased at execution sale the equity of redemption from the mortgage, from which sale no redemption has been had. By the statute the Somerset railway represents all the mortgage bondholders, and its title to and possession of the mortgaged property enures to their benefit. Having acquired the equity of redemption once held by the mortgagor, there is no occasion for a foreclosure of the mortgage. The *cestuis que trust*, under the mortgage and the real owners, now that the equity of redemption from the mortgage has been acquired, have a sufficient title to the property, and being in undisturbed possession and use of the same the trustees, who have no beneficial interest, cannot maintain an action to dispossess them.

Judgment for Defendants.

It is therefore considered by the court here that the said defendants have judgment and recover against the said plaintiffs their costs of suit.

24 STATE OF MAINE, }
Kennebec, } ss:

AUGUSTA, Apr. 12th, 1895.

And now, on this twentieth and last day of the term, the court orders that judgment be entered in all matters finally acted upon

and disposed of except where judgment has been entered upon motion as of an earlier day; that continuances be entered in all other matters, unless previously continued, and that this court be adjourned without day.

[Seal Sup. Jud. Court, Maine, 1820.]

Attest:

W. S. CHOATE, *Clerk.*

A true copy of the record.

Attest: WINFIELD S. CHOATE, *Clerk.*

NOTE.—By Revised Statutes of Maine, 1893, chap. 77, sec. 45, when a case is determined by the law court "The clerk of a county, by virtue of a certificate provided for in this chapter, received in vacation, shall enter judgment as of the preceeding term;" hence the certificate received in this case June 3, 1895, in vacation, requires judgment to be entered as of the preceeding term—*i. e.*, March term, 1895.

W. S. CHOATE, *Clerk.*

25 STATE OF MAINE, }
Kennebec County, } ss :

CLERK'S OFFICE, SUP. JUD. COURT,
AUGUSTA, May 13, 1896.

I hereby certify that I have carefully compared the annexed copy with the record of a judgment remaining in the office of the clerk of the judicial courts, holden in and for the county of Kennebec, and find the same to be a true transcript and exemplification thereof.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme judicial court.

[Seal Sup. Jud. Court, Maine, 1820.]

WINFIELD S. CHOATE, *Clerk.*

STATE OF MAINE, ss :

I, John A. Peters, chief justice of the supreme judicial court of said State of Maine, do hereby certify that Winfield S. Choate, Esquire, whose signature is affixed to above-written certificate, is clerk of said court for said county of Kennebec, and hath the keeping of the files, records, and proceedings of said court holden within and for said county, and is by law the proper officer to make out and certify copies thereof, and that public faith and credit are due and of right ought to be given to all his official acts and attestations done as clerk aforesaid, and that his attestation to the copy of record hereto annexed is in due form of law.

In witness whereof I hereunto set my hand and caused the seal of said supreme judicial court to be hereto affixed, at Augusta, this 13th day of May, anno Domini one thousand eight hundred and ninety-six.

Seal Sup. Jud. Court,
Maine, 1820.

JOHN A. PETERS.

26 STATE OF MAINE, }
County of Kennebec. }

In the Supreme Court of the United States, Oct. Term, 1895.

LEWIS PIERCE & *als*, Trustees and Mortgagees, Plaintiffs in Error, }
vs.
JOHN AYER & *als*. }

Assignment of Errors.

1. The learned court of Maine erred in holding and deciding that the rights of these trustees and mortgagees, and of the bondholders whom they represent, could be taken away and destroyed by a new corporation created under State legislation enacted subsequent to the date of the mortgage of July 1, 1871, and not authorized by any law then in existence, or by the terms of the mortgage contract, and erred in holding that such new corporation could acquire and hold said mortgage property without payment of said mortgage debt, under and by force of subsequent legislation wholly or materially variant from the laws in force at the date of such mortgage contract, and that by such holding the rights of said trustees and of said bondholders and their title to said property secured under the mortgage contract are impaired and destroyed.

2. The learned court erred in holding that a new corporation could be legally formed under said mortgage of July 1, 1871, and acquire the title to said mortgage property otherwise than in strict conformity with the terms of the mortgage and the laws in force at the time of its execution.

3. The learned court erred in holding that any of the proceedings offered in proof constituted a legal foreclosure of the mortgage, and erred in holding that there could be any such legal foreclosure except in accordance with the laws in force at the date of said mortgage, and erred in holding that a foreclosure could vest the legal title to the property in the new corporation, and erred in holding that a foreclosure of said mortgage could be effected without vesting said title in said trustees and mortgagees under said mortgage, in accordance with the terms thereof and the laws in force at its date.

4. The learned court erred in holding that such new corporation could purchase the right of redeeming the mortgage and, without paying the debt secured by it or any part of it and without any foreclosure of the mortgage in accordance with the laws in force at its date, acquire full title to the mortgage property, and thereby deprive and divest the trustees of the same, thus impairing their rights under the mortgage contract and destroying the same.

5. The learned court erred in holding that the acts of the legislature of Maine subsequent to the mortgage could enlarge the power of the majority of the bondholders over the rights of the minority or over the rights of any bondholders as such rights existed at the date of the contract.

6. The plaintiffs in error allege that there was an implied agreement and contract by the bondholders, not only with said trustees, but also as between themselves, that all the terms and stipulations of the mortgage contract should be carried out, and that the rights of every bondholder so secured by such terms and stipulations and by the laws then in force should be protected and enforced as therein provided, in case a resort to the mortgage property should become necessary, and that the acts of such of the bondholders as
28 attempted to form a new corporation not authorized by the mortgage or by the laws then in force, in order to get possession of the mortgage property, were in violation of such implied agreement and contract, and the learned court erred in sustaining such acts and holding them valid because authorized by subsequent State legislation, by reason of all of which the rights of the plaintiffs in error and of the other bondholders under said mortgage contract and their title to said mortgage property have been substantially impaired and destroyed.

7. The plaintiffs in error further show that their rights and the rights of the bondholders whom they represent, in case of a foreclosure of said mortgage under the laws in force at its date, would be materially different from and far more valuable than any rights offered to them or which could be secured to them in case of a foreclosure under such subsequent acts of legislation, and that the learned court of Maine erred in sustaining such subsequent acts and the attempted foreclosure under the same, thereby impairing the rights of said plaintiffs in error and of said bondholders secured under said mortgage contract.

8. They further show that all the terms and stipulations of the mortgage contract were within the power of the Somerset Railroad Company, then being the sole owners of the property, to make, and were binding alike on all the parties; that one of these terms and stipulations specially provided that the trustees in said mortgage should be the sole judges, in the first instance, whether any breach of the conditions of the mortgage had taken place, such as would justify a foreclosure of said mortgage or justify taking possession of the mortgage property; and the learned court erred in holding that
29 any foreclosure of this mortgage could legally be effected under subsequent legislative acts and without such action, determination, and judgment in the first instance by said trustees, and erred in refusing to give any effect to such provision in said mortgage contract.

9. The learned court erred in holding that the first-mortgage bonds and the mortgage itself had been extinguished and destroyed by subsequent legislative acts and the proceedings thereunder appearing in proof, without payment, and that the new bonds issued many years after by the alleged Somerset railway, under an alleged second mortgage upon the same property, had become a prior lien thereon; and the plaintiffs in error show that by such holding, decision, and judgment their rights under the mortgage contract of July 1, 1871, and the rights of the bondholders whom they represent have been impaired and wholly destroyed.

10. They therefore respectfully pray that for the errors aforesaid the judgment of the learned supreme court of Maine in the suit aforesaid may be reversed because it impairs the obligation of the mortgage contract aforesaid, and that they may be fully restored to their rights thereunder.

By CLEAVES & STEWART,
Their Solicitors and Att'ys.

A true copy.

[Seal Sup. Jud. Court, Maine, 1820.]

Attest: WINFIELD S. CHOATE, *Clerk.*

Endorsed on cover: Case No. 16,309. Maine supreme judicial court. Term No., 532. Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, trustees & mortgagees, plaintiffs in error, vs. John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill, & D. L. Foster. Filed May 23rd, 1896.



12 & 13.

FILED.

APR 25 1898

JAMES H. McKENNY

CLERK

No. 184 & 185.

SUPREME COURT OF THE UNITED STATES

By. g. STEWART & CLEAVES for P.

Filed April 25, 1898.

No. 184. LEWIS PIERCE ET ALS., Trustees,

Plaintiffs in Error,

VS.

SOMERSET RAILWAY COMPANY.

No. 185. LEWIS PIERCE ET ALS., Trustees,

Plaintiffs in Error,

VS.

JOHN AYER ET ALS.

BRIEF FOR PLAINTIFFS IN ERROR.

D. D. STEWART,

H. B. CLEAVES,

of Counsel.

PORTLAND, MAINE:

WILLIAM M. MARKS, PRINTER.

1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 184. LEWIS PIERCE ET ALS. TRUSTEES, PLAINTIFFS
IN ERROR, v. THE SOMERSET RAILWAY COMPANY.

No. 185. LEWIS PIERCE ET ALS. TRUSTEES, PLAINTIFFS
IN ERROR, v. JOHN AYER ET ALS.

BRIEF OF THE PLAINTIFFS IN ERROR.

Statement of the Cases.

The two cases involve the same questions, and, by leave of the Court are argued as one cause.

No. 185, although last on the docket, is first in time, and is a suit at law brought by the plaintiffs in error as trustees and mortgagees to recover possession of the railroad property and appurtenances of the Somerset Railroad Company, conveyed to the plaintiffs by mortgage deed of said Railroad Company on July 1, 1871, duly recorded on August 31, 1871, in the proper registry. Mortgage given to secure an issue of \$450,000 of bonds payable in twenty years with semi-annual interest.

Suit brought against John Ayer and als. as disseizors of the plaintiffs in error, and in actual possession of the property.

No. 184 is a suit in equity brought by an alleged new corporation calling itself the "Somerset Railway," asking to have the suit at law enjoined, and that the plaintiffs in error be required to release and convey their title under the mortgage to the alleged new corporation. This new corporation claimed title to the mortgaged property by force of certain acts of the legislature of Maine passed twelve years after the execution of the mortgage, and eight years before the bonds secured by it became due. Without any foreclosure of the mortgage, the "Somerset Railway" claimed that by force of these legislative acts, and the proceedings under them, a new corporation had been formed, although in a manner wholly unauthorized by the laws existing when the mortgage was executed; and that the title of the plaintiffs in error as trustees and mortgagees for the bondholders, and the rights of the bondholders themselves,

had been stripped from them without their consent, and had been transferred to, and vested in, the new corporation. And all this without sale, or purchase, or conveyance, or foreclosure of the mortgage, and in entire disregard of the provisions, special stipulations and agreements contained in the mortgage contract.

The Supreme Court of Maine after having in 1892, 85 Me. Rep. 79, decided against all these claims of the new corporation, in a later decision sustained them, and by final decree enjoined the plaintiffs in error from maintaining their suit at law for the recovery of the property, and required them to release and convey their title under the mortgage to the new corporation the "Somerset Railway."

The plaintiffs in error contended before the Supreme Court of Maine in both of the above suits, that these acts of the legislature of Maine subsequent to the execution of the mortgage, and the proceedings under them, if construed and sustained as the new corporation claimed, impaired, and, indeed, destroyed the obligations of the mortgage contract; and they have therefore brought these cases here for review by this Court.

The learned counsel for the defendants in error have filed motions to dismiss because they say no Federal question appears in the record. After more than seven years of conflict between these parties over Federal questions, and nothing else; with success and defeat attending each party, such a motion strikes any participant in that conflict as extraordinary. Neither party can state the case truthfully without stating a Federal question, and several of them.

In delivering the opinion of this court in *Keith v. Clark*, 97 U. S. 455, where a similar motion was made. Mr. Justice Miller said: "As the same facts are involved in the question of jurisdiction and the issue on the merits, it may be as well to state them."

This remark well applies to the present cases.

The bill in equity of the defendants in error sets out the mortgage of July 1 1871, with its special stipulations and agreements as between the mortgagors, the trustees, and the bondholders, and the mode in which alone a breach of the conditions of the mortgage could be declared, and the only way in which the foundation for a legal foreclosure could be laid under the laws then existing, by virtue of which a new corporation might be formed. It then alleges the formation of a new corporation under an act of the legislature of Maine *passed twelve years afterwards, in 1883*, in a manner wholly arbitrary, and entirely inconsistent with the original mortgage contract, and without pursuing any of the steps required by it; and it then claims that the title created in these trustees under the mortgage of July 1, 1871, and the rights of the bondholders secured by it, had all been transferred by force of this subsequent statute, and the proceedings under it, to the new corporation, the "Somerset Railway," and asks the Court to compel a conveyance by the trustees of their legal rights to such new corporation.

This bill raises on its face the question whether the obligation of

the mortgage contract is not only impaired, and changed, but destroyed by this subsequent statute and the proceedings under it.

A demurrer to this bill would have raised every Federal question. But it will be noticed that the first decision of the Court sustaining the validity of the mortgage of July 1, 1871, and directing the appointment of the plaintiffs in error as trustees to enforce its provisions, was made on Aug. 13, 1892; (*Anson and als.*, 85 Me. Rep. 79;) and the suit at law was brought by the plaintiffs in error for that purpose on the third day of December following, being the next term of the Court after their appointment; (Record in No. 185, Pages 7 and 9.) The bill in equity of the defendants in error was brought on Feb. 14, 1893, within six months after the decisions of the Court against them upon the same mortgage and statute and proceedings. (85 Me. Rep. 79, and Record of No. 184, Page 17.) The plaintiffs in error, then defendants in said equity suit, concluded that an answer to the bill would bring the litigation to an end sooner than a demurrer.

And thereupon an answer was filed in which the same Federal questions were raised that were relied upon in the former suit, said trustees having no suspicion or belief that the Court could reverse its former decision.

So that the bill in equity of the defendants in error, here the answer of the trustees, the plaintiffs in error here, and the record of the evidence, showing the mortgage of July 1, 1871, with its conditions, special stipulations and agreements, and the subsequent statute of 1883, and the effect given to that statute and the proceedings under it by the second decision of the Maine Supreme Court, not only impairing the mortgage contract, but destroying the title created by it and the rights secured under it without any foreclosure of the mortgage,—all raise Federal questions at once apparent upon reading them.

When the whole record bristles with Federal questions, it cannot be necessary for the party relying upon the protection of the Federal Constitution to continually refer in terms to that constitution, or to the particular clause relied upon.

In *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 140, this Court said: "The suit in the State Court was a bill in chancery brought "by the present plaintiffs in error against the defendants. The "case was heard on bill and answer alone, and the decree was "simply a dismissal of the bill. We must look therefore to the "pleadings to determine the question of jurisdiction. * * *

"It is objected, however, by the defendants, that the pleadings "do not, in words say that the statute is void because it conflicts "with the Constitution of the United States, and do not point out "the special clause of the Constitution supposed to render the act "invalid. It would be a new rule of pleading, and one altogether "superfluous, to require a party to set out specially the provision of "the Constitution of the United States on which he relies for the "action of the court in the protection of his rights. If the courts

"of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States.

"And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court can surely recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case."

In *Murray v. Charleston*, 96 U. S. 441, the Court said: "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state Court expressly assert a right under the Federal constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provisions of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of state legislation, this Court is authorized to interfere. The form and mode in which the Federal question is raised in the State Court is of minor importance, if, in fact, it was raised and decided. Not a word is said (in the Act of Congress of 1867,) respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly."

In the *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S., 232, the court reaffirm the principles laid down in *Bridge Prop. v. Hoboken Co.*, 1 Wall., 116, 148, *supra*, and say that "The true and rational rule is that the Court must be able to see clearly from the whole record that the provision of the Constitution, or Act of Congress, was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." "That such was the necessary effect in law of the judgment."

In *New Orleans v. N. O. Water Works Co.*, 142 U. S., 88, *Mr. J. Brown* in delivering the opinion of the court said: "We think that before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there

"was a legal contract subject to impairment, and some ground to believe that it has been impaired."

"There must be at least color of ground for the averment of a Federal question in a case brought here by writ of error to the highest court of a state in order to give this court jurisdiction."

Hamblin v. Western Land Co., 147 U. S., 531.

The cases cited in the motion of the learned counsel to dismiss, do not in the slightest degree conflict with the principles established in *Bridge Prop. v. Hoboken Co.*, 1 Wall., 142, 143, *supra*. In neither of the four cases cited in their motion to dismiss was a question of contract, or of its impairment by state legislation, raised. And in neither did the facts set out in the pleadings of the parties, or the evidence appearing in the record, disclose any question arising under any other branch of the Constitution of the United States. And the court therefore held that where the facts, *per se*, and the pleadings of the parties, presented, necessarily, no Federal question in the State court, there was not enough in the record to give this court jurisdiction. That in such case, if the party intended in fact to rely upon some provision in the Constitution of the United States as in some way applicable to his case, but not apparent in the pleadings or record, he should make known his intention and claim in the State court, so that that court should understand they were to pass upon a Federal question.

But these cases present no conflict with the numerous decisions of the court holding that where the pleadings, or the evidence, present *per se*, Federal questions in the State court which must necessarily have been decided by that court against the party claiming such protection as the Federal Constitution might give, that this court always has jurisdiction to review such judgments of the State courts. And it is believed that no case can be found in the history of this court from the commencement of the government to the present time, of which the court declined to take jurisdiction when the pleadings, or the evidence, in the state court, presented *per se* a Federal question.

Such a question may arise upon a demurrer to a declaration at law, or upon a demurrer to a plea in bar—the declaration or plea being grounded upon some state law raising *per se* a Federal question.

Of course the courts of a state are bound to take judicial notice of all of its public laws. This court also takes notice of all the public laws of the several states. *Furman v. Nichol*, 8 Wall., 57.

In this case, just cited, the plaintiffs in error held certain bank notes of the Bank of the State of Tennessee. The charter of the bank enacted in 1838 provided that such bank notes should be received in payment for taxes. The plaintiffs in error tendered these notes to the clerk of the county in payments for taxes due.

The clerk refused to take them upon the ground that they had depreciated in value. Thereupon the plaintiffs in error applied to

the state court for a mandamus to compel him to receive them. The petition for the mandamus alleged that "the said charter was a contract made with the people of the state, and every person into whose possession the said notes and issues of said bank might come that the same should be received by all collectors of taxes, and in payment of all dues to the state of Tennessee, and it is not in the power of the legislature of the said state of Tennessee to impair or annul the validity or binding force of said contract."

The defendant, the county clerk, demurred to the petition. The State Circuit Court overruled the demurrer and awarded the mandamus. But the Supreme Court of the state reversed the decree of the court below without any assignment of reasons, and entered judgment in the following words: "The court being of opinion that there is error in the judgment of the court below in overruling the demurrer in this case, doth order and adjudge that the said judgment be reversed and the demurrer sustained, and the petition dismissed."

This opinion was based upon an act of the legislature of Tennessee passed in June, A. D. 1865, repealing in express terms that section of the charter of the bank which made the notes of the bank receivable in payment of taxes; and another statute of the state passed February 16, 1866, prohibiting, in effect, receiving such notes in payment of taxes. (Page 46.) Upon this record the case was brought to this court. A motion was made to dismiss for want of jurisdiction. It was insisted by counsel in support of the motion that: "It is nowhere averred in the petition that the state had passed a law impairing the obligation of a contract. Nor can this be inferred by any necessary intendment from the record. The court below does not assign any reasons why it sustained the demurrer. * * The matter involved the construction of a Tennessee statute by a Tennessee court, (whether there was any contract as contended for by the plaintiffs in error,) not the validity of any statute; and the matter is not revisable here." (Page 51.) Precisely the objection made in the present suits.

In reply to this motion and argument, *Mr. Benj. R. Curtis*, who has probably never had any superior in this country as a profound lawyer and jurist, thoroughly acquainted with every branch of Federal law and the practice of the courts, said: "If any one will observe the character of the petition and of the demurrer, it will be as obvious without argument as with it, that the question raised and decided was by necessary intendment, none other than the constitutionality of the act of repeal, as against the plaintiffs, in violation of the contract with the state to receive the notes for taxes, and the decision in favor of its validity." (Page 49.)

Mr. Justice Davis delivered the opinion of the court. "It is urged," he said, "that the particular provision of the Constitution which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleading, but this is

"in no case necessary. * * It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did." * (Page 56.)

"The purpose of the petition," he continues, "the issue which it presented and sought to have determined, were as plainly to be seen, as if the words of the particular constitutional provision relied on had been inserted in it, and the obnoxious legislation spread out at length. All courts take notice, without pleading, of the Constitution of the United States, and the public laws of the state where they are exercising their functions."

In *Turnpike Co. v. Illinois*, 96, U. S., 64, a proceeding by information in the nature of a *quo warranto* brought by the State of Illinois against the St. Clair County Turnpike Co., charging it with unlawfully maintaining a toll-gate and collecting tolls upon a street in East St. Louis called Dyke avenue. The defendants justified under their charter, or act of incorporation, and several supplements.

The state replied that the legislature, by an act passed March 26, 1869, (subsequent to the date of the charter,) had granted to the city of East St. Louis exclusive power and control over said street called Dyke avenue, and imposed upon it the right and duty of grading and improving the street, and of removing obstructions from it, which would of course include the toll-gate. To this replication the defendants demurred, and insisted that the last mentioned statute impaired the obligation of the contract in its charter. The county court overruled the demurrer upon the ground that the charter of the company was limited in duration to 25 years and had expired. Upon appeal to the Supreme Court of the state, the judgment was affirmed. Upon this record the Turnpike Co. brought the case to this court by writ of error. It will be noticed that there was no allegation that the statute was unconstitutional, and no reference in any way to the Constitution of the United States except the statement that the "act of the legislature impaired the obligation of the contract made with itself in and by its said charter and the supplements thereto." This record was held sufficient to sustain the writ of error, *Mr. Justice Bradley*, who delivered the opinion of the court, saying: "The question before us is, whether any contract was set up by the defendant company, now plaintiff in error, in its justification, which has been impaired by the subsequent legislation of the state."

This is the precise question in the cases at bar. The bill in equity of the defendants in error, the Somerset Railway, sets out *in extenso* the mortgage of July 1, 1871, with its conditions, special stipulations and agreements. It admits that the title to the railroad property became vested in the trustees under and by force of that mortgage. It then alleges the formation of a new corporation under an act of the legislature of Maine passed twelve years afterwards, the mode of such formation being entirely inconsistent with

the stipulations and agreements of the mortgage contract, and of the laws existing at the time the mortgage was executed, and, as the plaintiffs in error most respectfully contend, not only impairing but destroying the obligation of the mortgage contract. The mortgage provided the manner of foreclosing it. Without any such foreclosure, or any foreclosure, the alleged new company claimed that by force of the subsequent statute and the proceedings under it in the formation of the new corporation, the title of the plaintiffs in error, the trustees, had been divested, and transferred by act of law, to said new corporation. These allegations are all found in the bill in equity, and were sustained by the final judgment of the Supreme Court of Maine.

In the answer of the plaintiffs in error, the defendants in the equity suit below, they deny the legal existence of the alleged new corporation, because not authorized by the law existing when the mortgage was executed, and because inconsistent with the stipulations and agreements of the mortgage contract, and destructive of them and of the rights secured by them.

They deny that these contract rights could, by force of any subsequent legislation, be taken away from them, or become vested in the alleged new corporation. "They deny that said mortgage of July 1, 1871 has, or could become *functus officio* except by payment of the bonds which it was given to secure; and of these the complainant admits that \$110,600 are still standing and unpaid. And for the payment of these bonds said trustees aver that the mortgage of July 1, 1871 is a valid security, and that they have brought writs of entry to recover said property for that purpose; and they deny that any statute of this state has been enacted, or could be enacted which will or can deprive said bondholders and trustees of the rights secured to them by virtue of their contract of July 1, 1871, and the laws of said state in force when said contract was made. (Record, Page 31.)

In answer to paragraph 14 of the bill in equity the trustees further say: "That the mortgage of July 1, 1871 was a first mortgage upon all of said property, and that the security afforded to them and vested in them under and by force of said mortgage contract, could not be taken away, nor in the least degree impaired by any subsequent legislation until said bonds and coupons were paid, or the statute of limitations had attached to them." (Record, Pages 33 and 34.)

"In answer to paragraph 15 these trustees say that they deny the legal existence of the alleged "Somerset Railway." They allege that the contract rights of all the parties to the mortgage of July 1, 1871, were fixed by the laws in force when said mortgage was executed. That no law of the State of Maine then existing authorized the organization of a new corporation in the manner here attempted. That the laws then existing formed a part of the mortgage contract, and provided a mode by which said mort-

"gage could be legally foreclosed, and a new corporation formed
"for the benefit of all the bondholders.

"But no law then existed, and these trustees are advised and
"believe that no such law exists now, or ever existed in Maine,
"authorizing a *part* of the bondholders of any railroad company to
"form a new company that shall supersede and set aside the security
"furnished by the original mortgage to those bondholders who take
"no part in the formation of such new company.

"They believe and aver that the rights of those bondholders who
"take no part in the formation of such company, are fixed by the
"mortgage contract and can be affected in no way except by pay-
"ment; that at most such new company occupy the situation and
"have the rights of the original corporation, and must pay up all
"outstanding bonds of other bondholders. They further aver that
"the attempted foreclosure of the mortgage of July 1, 1871, by bill
"in equity, [under the subsequent statute] and the alleged for-
"mation of the "Somerset Railway," were equally void as against
"these trustees and the unpaid bondholders; and that the parties
"and persons now usurping the control of the Somerset Railroad
"Company and its property are, as to them and the interests they
"represent, simply trespassers and disseizers. That even if said
"alleged foreclosure by bill in equity had been valid, its effect would
"have been to vest an *absolute title in the trustees under said mort-*
"*gage*, who would still continue to hold it for the benefit of the bond-
"holders exactly as before; and that no part of said title could vest in
"said 'Somerset Railway' even if legally formed." (Report Pages
84, 85.)

"These trustees in answer to paragraph 10 of said bill deny that
"the mortgage of July 1, 1871 was ever legally foreclosed. They
"aver that neither the original board of said trustees nor those
"respondents, their lawful and only successors, have ever taken
"any steps toward a legal foreclosure, or ever determined that there
"had been a breach of the conditions of said mortgage. That
"*by the express provisions of said mortgage the trustees alone*
"had, and *have* the power to determine in the first instance whether
"a breach of the conditions had taken place, and that such power is
"vested in no other person or tribunal; and that this power has
"never been exercised by either themselves or their predecessors.

"They admit that Reuben B. Dunn and John Ayer instituted
"proceedings in said court without first obtaining an adjudication
"by said trustees that there had been a breach of the conditions of
"said mortgage; without which, as these respondents are advised
"and believe, there could be no legal foreclosure of said mortgage,
"not even by the trustees themselves. And these respondents fur-
"ther aver that said Dunn and Ayer gave said trustees no notice
"of their suit in equity to foreclose said mortgage and did not
"make them parties to it; that said trustees were indispensable
"parties to any suit to foreclose the same, and that without their
"being made such parties any decree of foreclosure of said mortgage

"would be a nullity and of no force against said trustees. And said trustees further aver that all the proceedings of said Dunn and Ayer in attempting to procure a decree of foreclosure of the mortgage of July 1, 1871, were an attempt to shorten the time of redemption secured to the mortgagors, the Somerset Railway Company, by the mortgage contract, and were in violation of the contract rights secured to said mortgagors and to said trustees under said mortgage at the time of its execution, and were consequently utterly void; and they deny that said alleged foreclosure did, or could, in any way, by law, whether valid or invalid, "inure to the benefit of the 'Somerset Railway' [as alleged and claimed in the bill,] if by that phrase it is intended to allege that the title of the trustees under the mortgage of July 1, 1871, vested in said Somerset Railway, and deprived the bondholders under said mortgage of their security upon said property." (Transcript of Record, Pages 30, 31.)

All these allegations appear in the *pleadings* of the parties. As already remarked, they bristle with Federal questions. And the evidence and the statutes of the state, raise the same questions. And they all result in the single inquiry by this Court, whether the mortgage of July 1, 1871, has been impaired by the subsequent legislation of the state.

The Supreme Court of Maine did not sustain the alleged foreclosure set out in paragraph 10 of the bill in equity of the defendants in error. But they did sustain the claim that without any foreclosure of the mortgage of July 1, 1871, and against the provisions and stipulations of the mortgage itself, the title of the plaintiffs in error as trustees and mortgagees, and the rights secured to the bondholders under it, had, by force of the subsequent legislation, been transferred to the "Somerset Railway," and the trustees and bondholders stripped of all the contract rights secured by the mortgage; and the trustees required by the decree of the court to convey their title to said Somerset Railway Company. [Record, p. 223, 224, 225.]

Twice recently the Chief Justice of this Court has stated in few, but clear words, the rule of the Court relating to Federal questions. In delivering the opinion of the Court in *Powell v. Brunswick County*, 150 U. S. 440, and in *Louisville & Nashville Railroad v. Louisville*, 166 U. S. 715. he said: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so the State Court could not have given judgement without deciding it, that will be sufficient."

In the cases at bar the plaintiffs in error acquired title to the railroad property in dispute under the mortgage of July 1, 1871, with its special conditions, stipulations and agreements. This is admitted. The defendants in error claim title to the same property by force of a statute enacted twelve years afterwards, in direct violation of those special conditions, stipulations, and agreements. The plaintiffs in error say that the statute and the proceedings authorized by it, impaired the obligation of the mortgage contract

which vested the title in them; and that the construction and effect of that statute as given by the Supreme Court of Maine, destroyed the mortgage contract. That the only title claimed by the defendants in error is under this state statute. That where the title of the plaintiff is good, unless the statute of a state under which the defendant claims, gives the defendant a title, and the defendant has no other title, a decision in the defendant's favor is necessarily in favor of the validity of the statute. These were the only questions before the Court below; and the court could not have given the judgment they did without sustaining the validity of this statute, and holding that it transferred the title of the plaintiffs to the defendants. The question then arises instantly whether the statute, as construed by the court below, does not impair the obligation of the mortgage contract?

It is not easy to see how a Federal question can be more plainly and directly raised. The sole purpose of the bill in equity was to compel a transfer of the contract-title of the plaintiffs in error to the defendants in error by force of the subsequent statute title of the latter. Nothing but Federal questions were involved in the case.

The dissenting opinion of *Mr. Justice Emery*, concurred in by *Mr. Justice Whitehouse*, who delivered the opinion of the Court when the case was first before it, so shows.

This dissenting opinion is a very able exposition of one branch of the Federal questions involved in these cases, and is adopted as part of the argument of the plaintiffs in error.

In this discussion of the defendants' motion to dismiss, nearly all of the legal questions involved in these cases have necessarily been referred to.

The facts and evidence in the record require a further examination, and statement of the cases.

The Somerset Railroad Company was incorporated by act of the legislature of Maine in 1860.

Special Laws of 1869, Chap. 465, (Charter printed as part of this brief.)

By the law of Maine "all acts of incorporation shall be deemed public acts."

Rev. Stat. 1841, ch. 1, and Rev. Stat., 1883, ch. 1, sec. 6.

The road runs from West Waterville, now called Oakland, northerly through the towns of Fairfield, Norridgewock, Madison, Anson, Embden to Solon, a distance of about 34 miles. By an act of the legislature on Feb. 24, 1871, the "Somerset Railroad Company was authorized to locate and extend its railroad from Solon to Bingham Village about seven miles further North." Special acts of 1871, chap. 703.

In 1868 the legislature authorized the town of Anson and other towns to aid in the construction of the road. Special Laws of 1868, ch. 622. [Printed.]

By another act of same year the corporation was required to complete the road to Solon Village by March 1, 1872. Special Laws of 1868 chap. 544.

On July 1, 1871, the Somerset Railroad Company voted to issue its bonds for a sum not exceeding \$500,000 to secure completion of the road to Solon, a distance of 34 miles. The road was then chartered through to Bingham.

A mortgage was duly executed to secure payment of the bonds, and \$450,000 of bonds were actually issued and signed in the manner prescribed by the mortgage, payable in twenty years with interest at 7 per cent.

Mortgage covered all real and personal property then existing, and all to be thereafter acquired. This mortgage was duly recorded on Aug. 31, 1871. It contained the following conditions: "Provided, however, if the said company shall pay said bonds and coupons as they severally become due, and do and perform all on their part to be done and performed as hereinafter stipulated, this deed shall be null and void, otherwise of full force. This conveyance is made to said grantees for the benefit of the holders of the bonds of said company, to be issued as herein provided upon the trusts and stipulations following:

"*First.* Said grantees hereby accept said trust and hereby covenant with said company to perform it faithfully according to the stipulations of this deed, and the provisions of law.

"*Second.* It is agreed that said company shall keep said property in good repair.

"*Third.* Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges *prima facie* of said breach of conditions; and said company shall submit without resistance to any act of theirs for such purposes, not being bound by their judgment in a final trial and decision respecting a breach of condition.

"*Fourth.* Said company shall be entitled to the possession and management of said property until breach of condition of this mortgage, and also in case of breach of condition where subsequent performance by it is accepted.

"*Fifth.* Said trustees shall in no event be personally liable for the doings of each other. Each is to be accountable for his own misdoings, only. A majority of them may do any act herein provided for when it appears that the other had notice and declined to act, or omitted to attend a meeting duly notified, when that matter was to be under consideration."

There are other provisions in the mortgage, a copy in full of which

is set out in the Transcript of Record, Pages 17, 18, 19, and also Pages 83, 84, and 85.

At the time when this mortgage was made, July 1, 1871, the laws of Maine relating to railroad mortgages, provided for taking possession of the property by the trustees and applying the income towards the payment of the bonds and interest, and also provided the manner of foreclosing the mortgage, and are found in the Rev. Stat. of 1871, which took effect February 1, 1871.

By chap. 51, Rev. Stat. of 1871, the provisions are as follows :

SEC. 48. "The neglect of the corporation to pay any overdue bonds or coupons secured by such mortgage, for ninety days after presentment and demand on the treasurer or president thereof, shall be a breach of the conditions of the mortgage; and thereupon the trustees shall call a meeting of the bondholders, by publishing the time and place thereof three weeks successively in the State paper, and in some paper in the county where the road lies, the last publication to be one week at least before the time of the meeting.

"SEC. 49. At such meeting and all others, each bondholder present may have one vote for each hundred dollars of bonds held by him or represented by proxy; and they may organize by choice of a moderator and clerk, and determine whether the trustees shall take possession of such road, and manage and run it in their behalf."

"SEC. 50. If they so determine, the trustees shall take possession of such road and all other property covered by the mortgage, and have all the rights and powers, and be subject to all the obligations of the directors and corporation of such road, and may also prosecute and defend suits in their own name as trustees."

"SEC. 51. They shall keep an accurate account of all receipts and expenditures of such road and exhibit it, on request, to any officer of the corporation or other person interested. They shall from the receipts keep the road, buildings and equipments in repair; furnish such new rolling stock as is necessary, and the balance after paying the running expenses, shall be applied according to the rights of parties under the mortgage, and to the payment of any damages arising from misfeasance in the management of the road. They shall not be personally liable except for malfeasance or fraud."

"When all over due bonds and coupons secured by the mortgage are paid, they shall surrender the road and other property to the parties entitled thereto."

"SEC. 52. They shall annually * * * call a meeting of the bondholders, and report to them the state of the property, the receipts, expenses and the application of the funds. At such meeting, the bondholders may fix the compensation of the trustees; instruct them to contract with the directors of the corporation or other competent party, to operate said road while

"the trustees have the right of possession if approved by the bond-holders at a regular meeting, otherwise not exceeding two years, and to pay to them the net earnings thereof; or give them any other instruction they deem advisable; and the trustees shall conform thereto, *unless inconsistent with the terms of the trust.*

"SEC. 53. The trustees on application of one-third of the bond-holders in amount to have such mortgage foreclosed, shall immediately give notice thereof by publishing it three weeks successively in the state paper, and some paper, if any, in each county in which the road extends, therein stating the date and conditions of the mortgage, the claims of the applicants under it, that the conditions thereof have been broken, and that for that reason they claim a foreclosure; and they shall cause a copy of such notice and the name and date of each newspaper containing it, to be recorded in the registry of deeds in each county, within sixty days from the first publication; and *unless within three years from the first publication*, the mortgage is redeemed by the mortgagors, or those claiming under them, or a bill in equity as in cases of the redemption of mortgaged lands commenced founded on payment or a legal tender of the amount of overdue bonds and coupons, or containing an averment that the complainants are ready and willing to redeem on the rendering of an account, the right of redemption shall be forever foreclosed."

"SEC. 54. Each holder of overdue bonds or coupons shall present them to the trustees at least thirty days before the right of redemption expires, to be by them recorded; and such right shall not be lost by the non-payment of any claims not so presented; and the parties having the right to redeem shall have free access to the record of such claims."

"SEC. 55. The foreclosure of the mortgage shall enure to the benefit of all the holders of bonds, coupons, and other claims secured thereby; and they, their successors, and assigns are constituted a corporation as of the date of the foreclosure, for all purposes, with all the rights and powers, duties and obligations of the original corporation by its charter; and the trustees shall convey to such new corporation by deeds all the right, title and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged. If they neglect or refuse so to convey, the court, on application in equity, may compel them to do so."

"SEC. 56. The new corporation may call its first meeting in the manner provided for calling the first meeting of the original corporation and use therefor the old name; but at that meeting may adopt a new one by which it shall always after be known; and it may take and hold the possession, and have the use of the mortgaged property, though a bill in equity to redeem is pending, and may become a party defendant to such bill."

Such were the provisions of the law in force when the mortgage of July 1, 1871, was executed; and bonds to the amount of \$450,-

000 were issued and left in the hands of the president and treasurer of the corporation. The town of Anson subscribed \$80,000 to the stock of the road and took also \$27,500 of the bonds in 1871 and issued its own bonds for the full amount of both, on which it has paid interest half yearly ever since.

Bonds to the undisputed amount of about \$300,000 have been sold to the public, and the proceeds invested in building the road from West Waterville to Anson village, a distance of 25 miles. The balance of the \$450,000 is in dispute, as appears in the answer to the bill in equity and subsequently in the evidence. (Record, pages 27 and 28.)

The offices of the Somerset Railroad Company, and of the "Somerset Railway Company" have always been kept in a building at West Waterville, now Oakland, owned by the Dunn Edge Tool Company, so called, and rented of that company (Record, 156 and 157,) composed of Reuben B. Dunn, R. Wesley Dunn, his son, and John Ayer, with A. R. Small for bookkeeper and clerk.

Of this company Reuben B. Dunn was president, John Ayer, treasurer, usually—sometimes president. (Record, page 109.) Treasurer since 1868. (Record, 126.)

Reuben B. Dunn and *R. Wesley Dunn* and *John Ayer* were always directors in the *Somerset Railroad Company*, as the records of the company show. (Record, 106, 107.) *John Ayer* was always president of that company after June 1872. (Record, page 135.)

A. R. Small was treasurer of the *Somerset Railroad Company* always after 1873. (Record, page 113.)

A. R. Small has been clerk and bookkeeper, and in the employ of the Dunn Edge Tool Co. ever since 1868. (Record, 123.)

So that it will be noticed that the president, treasurer and bookkeeper and clerk of the *Dunn Edge Tool Co.*, were the president, treasurer and director of the *Somerset Railroad Company*, from 1872 to 1883, and ever since, and of the "Somerset Railway Company" ever since 1883, facts which have a bearing upon some features of the case, which will require consideration if the motives of parties are ever important in the consideration of a Federal question.

In 1875, *A. R. Small*, treasurer of the *Somerset Railroad Company*, by the direction of *John Ayer*, president of the *Somerset Railroad Company*, paid to *John Ayer* as treasurer of the *Dunn Edge Tool Co.*, interest coupons to the amount of \$6,500.00, and to *Reuben B. Dunn* personally interest coupons to the amount of \$866.00.

A few favorites were paid small sums, but nearly all the interest coupons paid that year were paid to *John Ayer* as treasurer of the *Dunn Edge Tool Co.*, and to *Reuben B. Dunn*, who was president of that company. (Record, p. 125 and 126.) *John Ayer* is described as "one of the managing men of the *Dunn Edge Tool Company* as well as treasurer" of that company. (Record, p. 126.)

The bondholders generally received nothing for the year 1875, and had no knowledge of the payment of these large sums to Dunn and Ayer and to the Dunn Edge Tool Co., upon their interest coupons.

The records of the Somerset Railroad Company kept by Ayer & Small fail to show what appropriation was made of the income of the road after 1878. The road was completed to Anson, 25 miles, through one of the best sections of Maine, in 1876; yet no evidence is offered as to what disposition was made of the gross receipts, or of the income of the road down to 1887.

Twelve years after the incorporation of the road, John Ayer and the Dunn Edge Tool Co. and Reuben B. Dunn, the parties who had appropriated the funds of the road to the payment of their own interest coupons in 1875, and who offer no evidence as to its disposal afterwards, down to 1887, procured an act of the legislature of Maine, without the slightest notice to the other bondholders, authorizing a part of the bondholders to form a new corporation in a manner wholly different from that provided by the law existing when the mortgage was executed, and in entire disregard of the stipulations and provisions of that mortgage; and four years later, April 11, 1887, procured another act transferring bodily to the new corporation the title of the trustees, and of the minority bondholders, without any foreclosure; or, if a subsequent foreclosure was resorted to, the title should vest in the new corporation instead of in the trustees under the mortgage, as provided by the law in force when the mortgage was made. (Record, page 108, 109.) (Act of April 11, 1887, printed.)

The first legislative act procured by these parties was passed March 6, 1888, and its chief provision was as follows: "Whenever the principal of any scrip or bonds issued by a railroad corporation shall have been due and payable more than three years, or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds, may commence a suit in equity for the purpose of foreclosing such mortgage; and the court may decree a foreclosure of such mortgage, unless the arrears are paid within such time as the court may order."

Undoubtedly the parties who procured the passage of this act supposed and intended that a foreclosure by bill in equity in the manner provided by this act, would vest the title under the mortgage in the persons who should bring the bill in equity.

Immediately after the passage of this Act, Reuben B. Dunn, the president of the Dunn Edge Tool Co, and John Ayer the treasurer of that Company, but also president of the Somerset Railroad Company, in behalf of themselves and of the Dunn Edge Tool Company, composed of themselves and R. Wesley Dunn, and A. R. Small, their clerk, alleging that they held a majority of the bonds, brought their bill in equity to foreclose the mortgage of July 1, 1871.

This bill was brought April 18, 1883, (Record p. 83.) No time was lost after the passage of the act was secured; and it will be noticed that the same counsel that brought the bill in equity were the same that procured the passage of the Act. (Record p. 83, 108, 109.)

Early in the summer of 1883, the opinion of the Supreme Court of Maine in *Stratton v. E. & N. A. Railway Co.*, 74 Me. 422 was published. In that opinion the Court said: "The trustees act for the bondholders, but they act for the original corporation as well, and are liable to account to it for their doings. *R. S. 1871, ch. 51, sec. 51.* The legal title to the road is in them, and when in their possession, is operated upon their own responsibility as trustees indeed, but controlled only by the terms of the trusts as found in the mortgage and the statutes in relation thereto. Even after the foreclosure the new corporation obtains title only by a conveyance from the trustees. *Rev. Stat. 1871, ch. 51, sec. 55.* They are principals, rather than agents, operating the road as an independent body, as trustees, accountable to all persons interested for the faithful discharge of their trust."

Under this decision it was plain that the foreclosure by bill in equity under the new act just procured, left the title still in the trustees, and would not vest in the complainants in the bill in equity as was intended. The next step was the formation of the "Somerset Railway" on Aug. 15, 1883, under the same Act, the details of which are found in the evidence—the chief actors in which are Reuben B. Dunn, John Ayer, The Dunn Edge Tool Co. and the same counsel. They appear to have got control of one of the trustees Mr. S. D. Lindsey, who seems to have forgotten that he was trustee not only for all the bondholders, but for the Somerset Railroad Company as well, the mortgagors who had appointed him. He seemed to forget that it was his duty to protect them if possible from foreclosure, and from a loss of their property. *Kennebec & Portland R. Co. v. Portland & Ken. R. Co.*, 59 Me., 45, 46, 47, 48. The evidence is convincing and uncontradicted that he aided Dunn and Ayer, and their counsel, in all their schemes to get possession and control of the road regardless of the rights of the mortgagor or of the other bondholders. (Record p. 95, 96, 97, 75 and 53.) He even undertook to buy in the equity of redemption under his own mortgage for the new corporation formed of only part of the bondholders. (Record p. 76.) It was upon his motion that the road was surrendered to the new corporation on Sept 1, 1883, (Record p. 75,) and he actually became a director in the new corporation. (Record, p. 53.) Such conduct was in gross violation of his duties as trustee under the mortgage of July 1, 1871. 2 Cook on Stockholders, etc., 3rd Ed., Sec. 815; *Ashuelot R. Co. v. Elliot*, 52 N. H. 397; *Sahlgard v. Kennedy*, 1 McCrary, 291. If Dunn and Ayer and Lindsey wanted an honest deal for the benefit of all the mortgage bondholders, they held more than the necessary one-half of the bonds, and could at any moment require the trustees to take possession of the road under Sect. 48 and 49 of Chap. 51 of the laws

in force when the mortgage was made, and manage it without any foreclosure for the benefit of *all the bondholders*, and apply the yearly income of the road to the payment of the interest as it became due. But of course under this *public management* of the road, *every bondholder* must be paid *pro rata* his *share of the net income*.

It could not be appropriated to the payment *only of Dunn and Ayer coupons*. Or Dunn and Ayer, who made up the Dunn Edge Tool Co., could at any time bring about an honest foreclosure under Sec. 53, by applying to the trustees under that section. And they could have retained possession of the road under Secs. 48 and 49 *during the entire three years that the foreclosure must run*, applying the income for the benefit of *every bondholder*. But this was not what they wanted. This kind of foreclosure was too public. Notice must be given three weeks in the state paper, and as many also in papers published in two counties, Kennebec and Somerset, and must then be recorded in the public Registry of Deeds in each county. It is evident that the Somerset Railroad Company, when it executed the mortgage of July 1, 1871, and issued its bonds under that mortgage, intended to rely, and had the right to rely upon having ample notice for three years of the impending foreclosure, so that they could not be deprived of their property by any possible contingency until the full expiration of the three years. And it is equally evident that the legislature intended that no foreclosure should take place until every stockholder, every bondholder and every creditor of the original mortgagors, and the whole general public, should have equally full and ample notice of the threatened foreclosure, and abundant opportunity to protect any rights they might have in the property. Not a day could be chipped from the three years given by the law when the mortgage was made.

Branson v. Kinzie, 1 How. 311; *Brine v. Ins. Co.*, 96 U. S. 627.

Of course Dunn, Ayer and Lindsey, and their counsel, knew that these provisions of law and the provisions of the mortgage itself, were amply sufficient to give to the trustees possession of the road and the control of its income; and the trustees could foreclose at any moment when it was deemed advisable to do so. But the *trustees* must act for *all the bondholders*; and by law, they knew that *each bondholder* would be entitled to be paid *pro rata* out of the income of the road. This was not what they wanted. Hence their procuring the act of March 6, 1883, by which a *majority* of the bondholders (which they were,) could organize a new corporation, and take the whole title to themselves by way of a bill in equity, as they supposed and intended.

This would give them possession of the road and its revenues and shut out the minority bondholders. And this was the scheme attempted. Mr. A. R. Small, who had been connected with Dunn and Ayer, as their clerk, since 1868, (Record 127,) was the treasurer of the Somerset Railroad Company, and upon him the bill in

equity was served, *which was the only notice given to anybody of the threatened foreclosure.* (Record p. 192 and 127.)

A very different proceeding from that required by the law when the mortgage was made. No service was made on *the trustees*, although all were then alive, and one of them working directly in the interest of Dunn and Ayer, and the Dunn Edge Tool Company, and against the interests of the Somerset Railroad Co., that appointed him trustee. *The trustees were not made parties to the bill.* And the inference is fair that the other two could not be influenced into such a proceeding, and were designedly kept in ignorance of it.

In some way it leaked out that Dunn and Ayer, and the Dunn Edge Tool Co., were endeavoring to get control of the road and to keep it, and four *minority directors* employed counsel to oppose the bill in equity, who entered an appearance and filed a demurrer to the bill, assigning special causes of demurrer, among which were that the trustees of the mortgage to be foreclosed were not made parties to the bill; and that by the specific provisions of the mortgage contract the trustees were made *sole judges prima facie* of the breach of the conditions of said mortgage, and that there was no allegation in the bill that they have ever acted on that question, or adjudicated that there was a breach of said conditions; and because the statute of 1883, chap. 166, sec. 4, is inconsistent with the terms and conditions of the mortgage itself. (Record 189, 190.)

This demurrer was filed July 3, 1883. (Record, 189.) No adjudication was had upon this demurrer until the Oct. Term, 1884. In the meantime and *soon after the demurrer was filed*, the *four minority directors* were displaced (on Aug. 15, 1883,) by the election of a *new board of directors* by *Dunn and Ayer, and the Dunn Edge Tool Co., holding a majority of the bonds*, and the opposition being thus withdrawn, the demurrer was overruled, and *without answer or even taking the bill pro confesso*, or the appointment of a master to report the amount due, a decree of foreclosure was entered at the Oct. Term, 1884. (Record, p. 47, 53, 87, 189, 190, 191.) The decree was in the following words: "This case came up for hearing at the term of said court held in and for said county on the third Tuesday of October, A. D. 1884, when the respondents' demurrer to the bill of complaint was overruled, and it appearing to the court that the several allegations in the bill of complaint were true, it was ordered, adjudged and decreed that upon the defendants paying the amount of coupons then overdue as particularly alleged in said bill on or before the first day of July, A. D. 1885, said complainants take nothing by said bill. But in default of said defendants paying the amount of said coupons as aforesaid, *by the time aforesaid*, it was ordered and decreed that the said defendants do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises." (Record, p. 86 and 87.) It will be noticed that this decree gave less than *nine months time for redemption* in

place of the three years secured under the mortgage contract; while the confirmatory decree of March 31, 1887, if it does not relate back to the previous decree simply, but is to be regarded as a substantive decree, *per se*, still shortens the time of redemption secured by the mortgage *more than six months*.

Immediately after procuring this confirmatory decree, on March 31, 1887, these same gentlemen secured on April 11, 1887 the passage of an act by the legislature of Maine vesting the title of the trustees under the mortgage of July 1, 1871, in the new corporation, the "Somerset Railway." (Record, p. 108 and 109.) Laws of 1887 chap. 103.

In April 1884 one of the trustees died. In May 1890 another. (Record, p. 7.)

Believing that the subsequent legislation affecting the mortgage of July 1, 1871, and all the proceedings under such legislation to be void as impairing the obligation of the mortgage contract, and finding that the parties who controlled the railroad and its income, were misappropriating that income to the payment of a new and subsequent set of bonds, instead of applying it upon the first mortgage bonds, the town of Anson holding \$80,000 of the stock of the road, and \$27,500 of the first mortgage bonds, together with other holders of bonds, amounting in all to \$78,100 (*Ins. of Anson et als, Pet.*, 85 Me., 85,) on July 2, 1890, filed a bill in equity in the Supreme Court of Maine for the appointment of new trustees to enforce the mortgage of July 1, 1871. Notice was duly given by order of court, and the alleged new corporation, the "Somerset Railway," the present defendants in error, appeared and opposed the appointment of trustees to enforce the mortgage. The alleged trustees of the new corporation also appeared and opposed such appointment. They all filed answers in which it was claimed that the new corporation had been legally organized under the provisions of the Rev. Stat. of 1883 and subsequent acts additional and amendatory, (the only amendatory or additional act, however, being the act of April 11, 1887,) and were in possession of the road, and were operating it for the benefit of the Somerset Railway. That the new corporation had acquired the legal title to the road by force of subsequent legislation, and the proceedings under it, and that the mortgage of July 1, 1871, "had become *functus officio*, and invalid, and that no "valid appointment of trustees can be made under it, and that it "has ceased to be security for said bonds; that the purpose of the "complainants is to have trustees appointed for the purpose of taking "possession of the road now in possession of said "Somerset Railway," and such conduct would destroy the value of the bonds "(\$225,000) issued by said "Somerset Railway." (Record, p. 180, 181, 182, 183.) The answers also alleged that the mortgage of July 1, 1871 had been foreclosed by decree of the Supreme Court April 1, 1887, and that the Somerset Railway had purchased the right of redeeming the mortgage of July 1, 1871 at a sheriff's sale on execution. They claimed that by the organization of the new cor-

poration under the Rev. Stat. of 1883, and the proceedings authorized by it, and by force of the act of April 11, 1887, the "Somerset Railway," had acquired the title of the trustees and of the mortgage bondholders under the mortgage of July 1, 1871, which had thereby become *functus officio*, and invalid, had ceased to be security for the bonds and no trustees should or could be appointed. (Record, p. 182, 183,) and would be "a gross violation of law." (Record, p. 186.)

The evidence taken on both sides was voluminous, containing all the records of all the proceedings, and the other proof, precisely as in these cases at bar; and the cause was heard before the Supreme Court of Maine on bill, answers, and proof, at the Law Term in Penobscot County, June 1891. A year and more afterwards viz. on Aug. 13, 1892, the opinion of the Court was announced. *Inh. of Anson et al., Pet.*, 85 Me., 79.

The arguments of counsel are fully reported in that case. The same questions were raised and argued as in the cases at bar—questions of constitutional law—the petitioners claiming that the statutes of 1883, and 1887, and the whole proceedings under them including the attempted foreclosure by bill in equity, and the formation of the new corporation, the "Somerset Railway," by *part* of the mortgage bondholders, were unconstitutional and void as against the trustees, the bondholders and stockholders, and that said trustees, bondholders, and stockholders had the right to rely upon the provisions and stipulations of the mortgage and the laws in force when it was executed. 85 Me., 80, 81, 82.

On the other hand the learned counsel for the Somerset Railway Co., insisted that the acts of 1883 and 1887 were valid, and also the foreclosure and organization of the new corporation under them. That it had acquired the title of trustees and bondholders under the mortgage of July 1, 1871, which has thereby become *functus officio* and void; and that the petitioners were estopped by *laches*, and no trustees should be appointed to enforce the mortgage for their benefit. 85 Me., 82, 83, 84.

The Court sustained none of the positions of the "Somerset Railway" in their answers. They held that the mortgage was not *functus officio*, but was valid, and directed the appointment of trustees to enforce its provisions for the benefit of the outstanding bondholders; that there was no *laches*, and, in substance, from the nature of the situation, could not be. 85 Me., 87. The court did not then undertake to determine whether the bondholders who had engineered the new corporation could still be considered as secured by the mortgage. They had cancelled and surrendered their bonds. And as against the other bondholders their *status* was certainly matter of doubt. But as to all other bondholders who had taken no part in the attempt to form the new corporation, the Court held the mortgage to be in full force and life, and that they were entitled to have new trustees appointed to enforce the provisions of the mortgage for their benefit.

And the Court also held that the *Somerset Railroad Company*, the *original mortgagors*, were in full life, and were entitled to be heard upon the question as to who the new trustees should be, and *must be made a party*. The orders of the Court were carried out. Lewis Pierce the surviving original trustee, and the original mortgagors, the *Somerset Railroad Company*, were made parties and appeared at the next term of the court in the county where the suit was pending, viz. the Oct. term 1892 in Kennebec County, and two of the present board of trustees were then duly appointed to fill the vacancies in the mortgage; and conveyances to them were duly made by the original trustee, Lewis Pierce. (Record p. 7.)

These vacancies being filled under and by the order and decree of the full Law Court of Maine for purpose of enforcing the security afforded by the mortgage, it became a grave question as to the *mode of proceeding* by the trustees. The decision of the court that the *Somerset Railroad Company*, the original mortgagors, were unaffected by any of the proceedings under the subsequent legislation, and must be made parties and be heard in the appointment of new trustees, was only another way of saying that the alleged new corporation, the "*Somerset Railway Company*," had no legal existence. The *two* could not exist *at the same time*. The *life* of the *new*, depended upon the *death* of the old.

It was plain beyond apparent doubt that the court regarded the subsequent legislation as impairing and violating the contract rights secured under the mortgage of July 1, 1871, which had never been legally foreclosed; and until foreclosed under the stipulations of the mortgage, and in the manner provided by the law in force when the mortgage was executed, there *could be no new corporation* which could acquire the title of the trustees under the mortgage. They had so decided the same year (1871) the mortgage was made in another case, viz., *Kennebec & Portland R. R. Co. v. Portland & Kennebec R. R. Co.*, 59 *Me.*, 20 and 54. The Court evidently held also that the alleged sale of July 8, 1884 of the equity of redemption was void, because there was no *new corporation* which *could purchase it*.

Stratton v. E. & N. A. Railway, 74 *Me.*, 425.

If this sale had been valid, it would have extinguished all the right of the *Somerset Railroad Company*, the original mortgagors, to the property covered by the mortgage, and of course the Court would not have required that *they should be made a party, and must be heard* in relation to the *appointment of new trustees to enforce that mortgage*.

In the case already cited, *Ken. & Port. R. Co., v. Port. & Ken. R. Co.*, 59 *Me.*, 21, the court said: "The complainants recognize 'the existence of the corporation thus formed by instituting this bill 'against them, and requiring them by the new name to answer.'"

Understanding from the decision of the Court that the new corporation had no legal existence as against the trustees and first mortgage bondholders, because if it had, and acquired the title to the

whole railroad property by force of the subsequent legislation, it was inconceivable that the Law Court of Maine would appoint trustees to enforce a *dead title*, the question came back as to what course the trustees should take in order to enforce and execute the duties imposed upon them by the court. It was plain that they should obtain control of the road, and its income, which was being misapplied every day. If they brought a bill in equity against the "Somerset Railway Company," to obtain such control, they admitted its legal existence, when the court had said, in effect, it had none, and *could not, so long as the old corporation existed unforeclosed*. The whole railroad property was in the possession of men who had no right to it as against the trustees. The net income was about \$25,000 yearly, of which \$11,250 was wrongfully applied on the interest of the \$225,000 bonds of the new corporation, and nothing towards the interest of the first mortgage bonds represented by the trustees. (Record p. 128, 129, 130, 131, 132.) They were simply disseizors, and liable as such to the trustees who, by the decision of the court, held the *legal* title for themselves, and the beneficial title for the first mortgage bondholders.

Against these disseizors no bill in equity could be maintained, because the plaintiffs, the trustees, had ample remedy at law. Both the common law of Maine, and the special statutes of Maine relating to railroad mortgages in force on July 1, 1871, and continuously and specially kept in force ever since and the general mortgage statutes of Maine, gave the trustees full and ample remedy by writ of entry on the mortgage to recover the railroad property.

Rev. Stat. 1871, Chap. 90, Secs. 1 to 15.

Rev. Stat. 1871, Chap. 51, Sec. 70.

Rev. Stat. 1871, Chap. 104, Secs. 1 to 15.

Rev. Stat. 1883, Chap. 90, Secs. 1 to 15.

Rev. Stat. 1883, Chap. 51, Sec. 108.

Rev. Stat. 1883, Chap. 104, Secs. 1 to 15.

(These statutes are all printed as part of this brief for the plaintiffs in error.) A writ of entry upon a mortgage is, by the laws of Maine and Mass., substantially a bill in equity in which the rights of all parties are determined upon the principles of equity and good conscience.

Opinion by *Mr. Justice Gray, Holbrook v. Bliss*, 9 Allen, 69.

2 Jones on Mortgages, Sec. 1296.

Davis v. Thompson, 118 Mass., 499.

Such a suit against mere trespassers, would entitle the plaintiffs to judgment for the property, and damages for its detention and use and income under the statutes of Maine. Against parties actually holding the right of redemption, or claiming under them, judgment would be for the amount found to be due in equity and good conscience under the provisions of the mortgage, with right of payment within two months. If not paid within that time, trustees to have possession of the mortgaged property.

A writ of entry upon the mortgage has always been the usual remedy in Maine, Mass. and New Hampshire for the recovery of railroad property. 2 *Jones on Mortgages*, Sec. 1307.

York & Cumberland R. Co. v. Myers, 41 *Me.*, 109, 119.

Wood v. Goodwin, 49 *Me.*, 262.

Kennebec & Port. R. Co. v. Portland & Ken. R. Co., 59 *Me.*, 25, and 31.

Haven v. Grand Junc. R. Co., 109 *Mass.*, 89, 90.

Haven v. Grand Junc. R. Co., 4 *Allen*, 81.

Haven v. Adams et als., 8 *Allen*, 368, and 369.

Boston, Concord & Mont. R. Co. v. Boston & Maine & Boston & Lowell R. Co., 65 *N. H.*, 393.

In this controversy in these famous cases in N. H., between these railroads, two bills in equity were dismissed, and the plaintiffs were held entitled to recover the railroad property and rolling stock at law in a writ of entry upon their mortgage, the court holding that they had ample remedy at law, and therefore bills in equity could not be maintained.

The trustees, therefore, the present plaintiffs in error, brought a writ of entry upon their mortgage to recover the railroad property against the parties in possession of it. Suit brought at the next term of the Supreme Court in the county after their appointment. *Hadley v. Hadley*, 80 *Me.*, 460.

Before this writ of entry could be tried at law, the new corporation, the "Somerset Railway Co.," brought the present bill in equity (No. 184 on the docket of this Court,) in Cumberland county, to restrain the trustees, the present plaintiffs in error, from prosecuting their suits at law in Kennebec and Somerset counties to recover the railroad property, and asking the court to enjoin such suits, and to declare the mortgage, under which the same Court, within six months previously, had appointed the plaintiffs in error to enforce its provisions, *functus officio*, and void, and alleging precisely the same grounds set up in their answers in 85 *Me.*, 79, and claiming that by force of the subsequent legislation and the proceedings under it, the title of the trustees under the mortgage had become vested in the new corporation, the "Somerset Railway," and asking the court so to declare and decree, and require the trustees, the present plaintiffs in error, to convey the whole railroad property to the "Somerset Railway"—every proposition of which the court had just decided against them by declaring the mortgage valid and appointing trustees to enforce it, and requiring the original mortgagors, the Somerset Railroad Co., to be made a party to the proceedings to enforce the mortgage.

And the Court turned squarely round and held that by force of the statutes passed twelve years after the mortgage was executed, and by force of the proceedings under those statutes, the title of the trustees and of the mortgage bondholders under the mortgage had become divested, without any foreclosure of the mortgage, and

without any of the proceedings required by the stipulations and agreements of the mortgage itself, and had vested in the new corporation calling itself the "Somerset Railway;" and they declared the mortgage of July 1, 1871, *functus officio* and void, and required the trustees to convey the whole railroad property to the new corporation, in violation, as these plaintiffs in error most respectfully contend, of the contract rights secured under the mortgage of July 1, 1871.

Somerset Railway v. Pierce et als., 88 Me., 86.

And this is the question now before this Court upon these writs of error.

Assignment of Errors.

The first four errors assigned relate to the effect given by the learned Supreme Court of Maine to the formation of the "Somerset Railway" under the subsequent legislation, and may, with the leave of the court, be considered together.

A somewhat careful examination of the history of railroad mortgages in the States of the Union, and the rights of the parties thereto, as determined by the Supreme Court of the United States, and by the various State courts, fails to discover an instance, until we reach the cases at bar, where the title vested in the trustees and mortgagees and bondholders, under a mortgage duly executed and recorded, has ever been held to be divested and transferred to other parties by force of subsequent legislation, and without any foreclosure.

In *Canada Southern R. Co. v. Gebhard*, 109 U. S., 527, a majority of this Court held that the rights of the bondholders and trustees under a *Canada* railroad mortgage, might be legally affected and controlled by a subsequent act of the Canadian Parliament, without a legal foreclosure. But in the opinion of the Court, and in the powerful dissenting opinion of *Mr. Justice Harlan*, it was expressly admitted that such legislation by a State would be void because impairing the obligation of the mortgage contract.

The majority opinion says: "The Dominion parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized throughout the Dominion when the corporation was created, and when all its bonds were executed and put upon the market. * * * It takes the place, in England and Canada, of foreclosure sales in the United States. (Pages 538 and 539.)"

The Court had previously said in the same opinion on page 535: "It seems to be eminently proper that where the legislative power exists, some statutory provision should be made for binding the

"minority in a reasonable way by the will of the majority; and
 "unless, as is the case in the States of the United States, the
 "passage of laws impairing the obligation of contracts is forbidden,
 "we see no good reason why such provision may not be made in
 "respect to existing as well as prospective obligations." See also
Gilfillan v. Union Canal Co., 109 U. S., 404.

In the dissenting opinion of *Mr. Justice Harlan*, he says: "If
 "any State in this Union should assume to pass a law with refer-
 "ence to a railroad corporation she had created, requiring the
 "holders of its bonds, for which they had paid value, to surrender
 "them and take in their place others of less value, (having a less
 "rate of interest,) and payable at a different time, our courts,
 "Federal and State, would be constrained by their obligation to
 "support the constitution of the United States, to declare such
 "legislation to be in conflict with that instrument." (Page 542.)

It would be difficult to state the principle involved in the cases
 at bar so clearly as is done in this extract.

The Somerset Railroad Company was incorporated by the State
 of Maine. The plaintiffs in error, as trustees and mortgagees, and
 the bondholders, confessedly acquired title to the railroad property
 by the mortgage of July 1, 1871.

Twelve years afterwards the State assumed to pass a law by
 force of which and the proceedings under it, the bondholders who
 had paid value for their bonds, were required to surrender them
 and take in their place, *not even other bonds of the same corporation*
 at a less rate of interest, and payable at a *different time*, but *stock*
 in a *new corporation* already encumbered with an issue of bonds for
 \$225,000, thus turning *first mortgage bonds, without any foreclosure*
of the mortgage, into stock of a corporation organized under a
 subsequent statute in entire disregard of the provision and stipula-
 tions of the mortgage contract.

It is not easy to imagine, as it seems to the plaintiffs in error, a
 more flagrant instance of the destruction of the obligation and
 rights secured by contract, the slightest impairment of which is for-
 bidden.

In *Farrington v. Tennessee*, 95 U. S., 683, the court said: "The
 "constitutional prohibition applies alike to both executory and exe-
 "cuted contracts, by whomsoever made. The amount of the im-
 "pairment of the obligation is immaterial. If there be any, it is
 "sufficient to bring into activity the constitutional provision and
 "the judicial power of this court to redress the wrong."

The plaintiffs in error respectfully submit that this mortgage, by
 the laws of Maine, vested the legal title to the property in the
 trustees and mortgagees, the equitable title in the bondholders, and
 the right of redemption in the mortgagors—three classes of rights
 secured under the same contract, all being rights of property pro-
 tected from impairment by any state legislation. That contract
 also provided the manner in which these several rights should be

enforced and protected. The trustees and mortgagees could become the absolute owners of the property, (and then only in trust,) *by a foreclosure*, and in no other way. The bondholders could take possession of it through the trustees without foreclosure, and apply the income to the payment of the bonds and coupons until fully paid; then they must restore it to the mortgagors. The rights of the mortgagors to redeem the mortgage could be taken away only in the manner agreed upon in the contract—by the adjudication of the trustees that there had been a breach of the conditions of the mortgage, followed by a notice of foreclosure published in the state paper and in some newspaper in each of the two counties, Kennebec and Somerset, in accordance with the provisions of the law in force when the mortgage was executed, which provisions made a part of the mortgage contract as fully as if specifically set out in it.

Von Hoffman v. Quincy, 4 Wall. 550.

Baonson v. Kinzie, 1 How. 311.

Barnitz v. Beverly, 163 U. S. 118.

Phinney v. Phinney, 81 Me. 450.

Peabody v. Stetson, 88 Me. 281, 282.

Nothing but a foreclosure as there provided, with three years right of redemption, and a *record of such foreclosure* in the *public Registry of Deeds of each county*, such record to be made *within sixty days after the first publication*, could take away the rights of the mortgagors secured by the terms of the mortgage.

No subsequent act of legislation could change, or in any manner affect these provisions and stipulations. They were part of the contract of July 1, 1871. Any variation from these specific requirements provided by the law then existing to protect the estate and rights of the mortgagors, even the neglect, or omission, to record the notice of the foreclosure in the public registry for a single day beyond the sixty, would render the foreclosure void, and the estate of the mortgagors would remain wholly unaffected by it.

Storer v. Little, 41 Me. 69, 71, 73.

Freeman v. Atwood, 50 Me. 474.

Hatch v. Bates, 54 Me. 41.

“The record of the notice of a foreclosure of a mortgage is the *only proper evidence* of the time when the right of redemption will *“be forever foreclosed.”*”

Chase v. Savage, 55 Me. 543.

Let us now, in connection with this branch of the case, examine more particularly the opinion of the learned Court of the State, which was delivered by *Mr. Justice Strout*. He admits the proper execution of the mortgage of July 1, 1871, and the issue of \$450,000 of bonds under it, and the appointment of Pierce, Holland and Lindsey as trustees and mortgagees under it, the subsequent decease of Lindsey and Holland, and the due appointment in 1892 of Heath and Drew, present plaintiffs, in their places. He says that for more than three years prior to July 11, 1883, the company had failed to

pay the interest on the bonds, and "thereby had made a breach of the condition of the mortgage, though the principal of the bonds was not then due." He then says: "The trustees under the mortgage never entered into possession of the mortgaged property, nor took any measures to secure a foreclosure of the mortgage; but the Somerset Railroad Company remained in possession of all the property until the formation of a new corporation under the name of the Somerset Railway. On the eleventh day of July, 1883, the holders of the mortgage bonds, to an amount largely exceeding one-half of the same, elected in writing to form a new corporation, and on the fifteenth day of August, 1883, did form a new corporation under the name of the Somerset Railway as provided by Chap. 51 of the Revised Statutes and *also* additional thereto and amendatory thereof." 88 Me. Rep., p. 8 and 89. It should not be forgotten in this connection that the opinion was prepared in 1895, and the "Revised Statutes" referred to, were those of 1883, the last revision then and still in force. No *amendatory*, or *additional* act has been passed since 1883, except the act of April 11, 1887, the passage of which was procured, as already stated, by Dunn, Ayer, and the Dunn Edge Tool Co., (Record, p. 108, 109,) and which provided in terms that the title of the trustees and of the mortgage bondholders, where the interest was unpaid for more than three years, should vest without foreclosure, or with one, in a new corporation formed by a majority of the bondholders, without regard to the terms of the mortgage.

And this statute is directly referred to as the *foundation of the new corporation* at a meeting held *just a month*, (on the 11th of May, 1887,) *after its passage had thus been procured*; the same meeting at which the capital stock of the new corporation was voted to be fixed under Sec. 111 of Chap. 51 of the Rev. Stat. of 1883, at "the amount of the unpaid bonds and overdue coupons *taken at their face* at the time of the organization of this corporation, to wit, the fifteenth day of August, A. D. 1883, and must be divided into shares of \$100.00 each." (Record, p. 58 and 59.) And see also 88 Me., 89. This same statute is referred to Par. 5 and 10 of the present bill in equity of the defendants in error, as the foundation of their title to the Somerset Railroad Company's property, and as making the mortgage of July 1, 1871, "*functus officio*, and as "having ceased to become security for said bonds." (Record, p. 9 and 12.) The constitutionality of this statute, and its necessary effect in transferring the title of the trustees, and of the mortgage bondholders, to the alleged new corporation, was argued by the learned counsel for the defendants in error, when this case was first before the Supreme Court of Maine; and its validity was denied by the counsel for the plaintiffs in error. *Anson et als., Pet. for Appt. of Trustees*, 85 Me. 79, 80, 81, 82 and 83; and its constitutionality was not sustained by the court.

But to return to the opinion of the court below in the present cases: "In pursuance of the organization of the new corporation,"

continues the learned judge, "and by the consent of the Somerset Railroad Company, the Somerset Railway, on the first day of September, 1883, took possession of the railroad and all other property included in the mortgage, and have ever since held possession of the same and operated the road. The trustees under the mortgage (of July 1, 1871,) have brought suits to recover possession of all the property included in it, and mesne profits, against various officers and servants of the Somerset Railway, which are now pending. The bill prays to have *the title and possession* of the *Somerset Railway* to the property described in the mortgage declared valid; and the mortgage of July 1, 1871, declared void, and the holders of outstanding bonds and coupons ordered to surrender the same in exchange for stock in the Somerset Railway; and that the plaintiffs in the suits at law may be enjoined from prosecuting their suits, and from disputing the title and possession of the Somerset Railway." (Record, p. 216.) This is a fair statement of the cases. It admits the title of the trustees, the plaintiffs in error in the present suits, to have been created by *contract—by the mortgage of July 1, 1871*. It admits the title of the defendant in error, the Somerset Railway, to have been created by *force of subsequent legislation*. He confesses that it has no other title. He claims no other. This instantly raises the great Federal question whether the subsequent legislation does not impair the obligation of the mortgage contract. This was the question, and the only question in the court below, and the only question now before this court.

In the court below the statute title was sustained. The contract title was destroyed.

The learned judge then refers to the manner of effecting a foreclosure by the trustees under the laws in force when the mortgage was executed, requiring notice to be published in the state and county papers three weeks successively, and recorded in the county registries, and giving the mortgagors three years in which to redeem, and if not redeemed, providing for the *formation of a new corporation by all the bondholders* as of the date of the foreclosure.

He then says: "These provisions for perfecting the security of the mortgage bondholders, and to enable them to realize their debts by operation of law, must be treated as part of the mortgage contract, and the rights thereby secured to the bondholders could not be abridged or taken away by subsequent enactments. But it was competent for the law-making power to change the form and method of the bondholders' remedy, provided the new method protected their rights as fully as that existing when the mortgage was given.

"*Von Hoffman v. City of Quincy*, 4 Wall. 535; *Seibert v. Lewis*, 122 U. S. 2940; *Edwards v. Kearzey*, 96 U. S. 595; *Louisiana v. New Orleans*, 102 U. S. 206."

He then refers to a statute of 1876 which, he says, gave to the holders of overdue bonds the benefits of the provisions of Chap. 51,

Rev. Stat. 1871 where the mortgage had been legally foreclosed; and to the statute of 1878, which, he says, applied to overdue bonds "in all cases in which the principal of said scrip or bonds shall have been due and payable for more than three years, *in the same way* and to the same extent as if the mortgage had been legally foreclosed;" and finally refers to the statute of March 6, 1883, by which, he says, "the act of 1878 was extended to apply to cases in which no interest has been paid for more than three years." It will be noticed that the statutes of 1876 and 1878 apply only to overdue bonds; and that the statute of 1883 was the *first* which applied to overdue interest, and the *first* which could be made to apply in the *present cases*. It will be noticed also that the statutes of 1876 and 1878 referred to by the learned judge simply *extend the provisions of Chap. 51, Rev. Stat. 1871, Secs. 47 to 50 inclusive, so as to apply to*, or "*give the benefit of them*" to the holders of overdue mortgage bonds whether foreclosed or not; and the statute of 1883 extends the same provisions to cases of three years of overdue interest. It might not be easy to determine just what was actually intended under and by force of these statutes. Extending 23 sections of a previous statute to existing contracts is not an easy matter, and would be pretty sure to change and impair them. But, as stated by this court in a late case, in an opinion delivered by *Mr. Justice White*: "The issue which we are to determine is not what interpretation *should* be given to the statutes of the State of Louisiana, but whether, accepting the meaning affixed to those statutes by the court of last resort of the state, their provisions, as so interpreted, are repugnant to the Constitution of the United States."

Costello v. McConnico, S. C., U. S., Feb. 1, 1898.

And the question here is whether accepting the meaning affixed to these statutes of Maine by the Supreme Court of that state, these provisions are repugnant to the Constitution of the United States.

It is further said in the opinion below: "The remedy by foreclosure by the trustees existing when the mortgage of 1871 was given, has never been abridged or taken away; but the subsequent statutes have *enlarged* and made *more efficient* the bondholder's remedy. The new provisions in the subsequent acts, *enabled a majority* in amount of the bondholders to act *directly without the intervention of the trustees*, thus *simplifying the proceedings*. The interest upon the mortgage bonds having been unpaid for more than three years prior to July 11, 1883, the bondholders holding \$351,900 of the bonds secured by the mortgage, on that day elected in writing to form a new corporation in accordance with Chap. 51 of the Rev. Stat. of 1871, *as amended by the acts of 1878 and 1883, instead of resorting to a foreclosure by the trustees*. It will be noticed that the amendatory acts required the action of a majority in amount of the mortgage bondholders, while the *foreclosure by the trustees* required the concurrence of only one-third of

"the amount. The proceedings to organize the new corporation "under the amendatory acts, appear to be in strict conformity thereto; and the new corporation, under the name of the Somerset Railway, thereby became a legal corporation on the fifteenth day of August, 1883, and then became entitled to take and hold the possession and have the use of the mortgaged property."

It will be perceived that by the construction and effect which this language gives to these subsequent statutes of 1878, and 1883, *the organization of the new corporation on Aug. 15, 1883, takes the place of, and was exactly equivalent to a foreclosure by the trustees, the three years of which expired on that day.* The new corporation organized on Aug. 15, 1883, acquired, the court say, *the same title on that day that the trustees and all the bondholders would have acquired under the foreclosure by the trustees, and thereby "became entitled to take and hold the possession and have the use of the "mortgaged property."*

And the court refer directly to *Rev. Stat. of 1871, Sec. 56*, showing exactly *the title thus acquired by the new corporation.*

It cannot be successfully denied that this is the exact scope and effect of the judgment of the court,—changing and transferring in the twinkling of an eye, by force of subsequent legislation, the title of the trustees and first mortgage bondholders under a mortgage contract executed twelve years previously to secure the payment of bonds not due for eight years yet to come.

Let us consider the inevitable results of this opinion and judgment. On the morning of Aug. 15, 1883, the title of the trustees, and of the first mortgage bondholders, and the three years right of the mortgagors to redeem, were unquestioned, and stood exactly the same as when the mortgage was executed.

The trustees, who by the special provisions and stipulations of the mortgage were constituted sole judges of a breach of the conditions of the mortgage, had never made any adjudication upon the subject, or taken any measures to foreclose the mortgage, nor had they been asked to do so by any of the bondholders—thus showing that neither trustees nor bondholders deemed a foreclosure advisable.

But on Aug. 15, 1883, a new corporation, not formed in the manner provided by the mortgage, but by force of legislative acts subsequent to the mortgage, *eo instanti*, take the whole title under the mortgage—the organization of the new corporation being, as the court holds, the exact equivalent of a *foreclosure by the trustees*—thus cutting off the equity of redemption of the mortgagors, divesting the title of the minority bondholders, and turning the title of the trustees into a "dry trust" which they are required to release and convey to the new corporation, the bonds being declared paid, which could only be done by a thorough and absolute foreclosure, cutting off the equity of redemption.

So that, by force of a subsequent statute, the trustees in a railroad mortgage, and the holders of the bonds secured by that mortgage and not yet due, in a single day, without notice of any kind, are shorn of their title to the property, the mortgage declared *functus officio*, and the property given to third parties.

Such a proceeding would seem to be contrary to every principle of our government, and forbidden by our laws guarding the sanctity of contracts.

Boyd v. United States, 116 U. S. 635.

Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U. S. 154.

Loan Association v. Topeka, 20 Wall. 655, 663.

The learned judge who delivered the opinion we are considering, assumes that the mortgage with all its conditions and stipulations was but part of the *remedy* which the existing laws give to the bondholders to enable them to collect their bonds, and, as such remedy, was open to any change by subsequent legislation which would, as he says, "*enlarge and make more efficient the bondholders' remedy.*" The plaintiffs most respectfully suggest that this was a grave and fundamental error. The mortgage was a *contract*—a contract under seal, securing to the trustees and bondholders *property rights*—just as much a contract as the bonds themselves, and equally entitled to protection from impairment.

In *Cargill v. Power*, 1 Mich. 371, a case almost as famous as *Bronson v. Kinzie*, 1 How. 311, or *Brine v. Insurance Co.*, 96 U. S. 627, the Court said: "The remedy is that which the law gives for the enforcement of contracts, within the meaning of which a mortgage security does not come. A mortgage contract is no more a remedy than the bond which accompanies it—they are both the evidence of and security for the indebtedness, and the one is as much subject to *legislative alteration* as the other; they are both the subject matter and the foundation of *suits*, and these suits as constituting the means of enforcing the one or the other, are the *remedy* afforded by the law. The *remedy* is subject to legislative modification; the *mortgage contract is not*. Its terms were agreed upon by the parties, and they afford the rule for the measurement of the rights of the mortgagor and mortgagee."

See also *Sage v. Cent. R. Co., of Iowa*, 99 U. S. 334, 342, 343.

Chicago R. Co. v. Fosdick, 106 U. S. 47.

In *McClelland v. Norfolk R. Co.*, 110 N. Y. 477, 478, the Court said: "This mortgage, in accordance with familiar rules, must be construed according to the intent of the parties in making it, and that intent, if its language is plain and unambiguous, must be derived from an examination of the instrument itself. *That contains the measure of the liability of the mortgagor, as well as a definition*

"of the power, duties and rights of the trustees and bondholders named therein." In *Coal Co. v. Blatchford*, 11 Wall. 177, this Court said: "In the case at bar the plaintiffs, (the trustees,) are the real prosecutors of the suit. They are parties to the mortgage contract, negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made. The right to use different remedies is expressly provided upon default in the payments stipulated: and the adoption of either rests at the option of the plaintiffs. So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them." These doctrines and principles apply in all their force to the cases at bar, and render all attempts of others "to prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over the trustees," simply void, because impairing the mortgage contract, and the rights secured to the trustees under it. If a subsequent State Constitution cannot be allowed to impair or destroy a contract, a subsequent state corporation certainly cannot.

Dodge v. Woolsay, 18 How. 331.

Keith v. Clark, 97. U. S. 455.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

When the mortgage of July 1, 1871, was made, the laws of Maine then in force provided two modes only of foreclosing a railroad mortgage, one by suit, a writ of entry upon the mortgage, which by special statute provisions has ever since been kept in force; the other by publishing notice of the intended foreclosure in the state and county paper three weeks successively, and recording such notice in the county Registry of Deeds within sixty days after the first publication. Whichever way was adopted by the trustees, three years right of redemption was secured to the mortgagors.

Bronson v. Kinzie, 1 How. 311.

Planters' Bank v. Sharp, 6 How. 327, 330, 331, 332.

Brine v. Ins. Co., 96 U. S. 627.

Barnitz v. Beverly, 163 U. S. 118.

"The duration of the mortgagor's right to redeem," say the Supreme Court of Maine, in *McPherson v. Hayward*, 81 Me. 336, "is clearly defined by law, and one the court cannot abridge or enlarge by a single day."

In *Phinney v. Phinney*, 81 Me. 460, the same court said: "At the time when this contract (the mortgage,) was made, the statute law of the state provided specific modes by which the mortgagee of real estate might foreclose his mortgage, and it specifically defined the time in which the mortgagor might redeem. * That time was a fixed and definite term of three years. * The rights of the mortgagee were no less valuable to him than were those of the mortgagor. If existing and secured to him, from the nature

"of the contract and the laws in force at the time of its execution, those rights were as inviolable as were those of the mortgagor.

"While it is not intended to disturb the proper application of the principle that a state to a certain extent and within proper bounds may regulate the remedy, yet if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests."

Phinney v. Phinney, 81 Me. 460, 461.

And the Court held that "this mortgage, having been given long prior to the act of the legislature in question, must be governed by the law then existing both as to its redemption and foreclosure." Page 459. The act in question extended the time of redemption and was held void as impairing the obligation of the mortgage contract.

It would seem as if the "rights and interests of *the party in a contract*," (in the present cases at bar the trustees under the mortgage of July 1, 1871,) were pretty effectually impaired, when they are struck out of the contract, turned out of doors, and a foreclosure effected by other parties "*without the intervention of the trustees, thus simplifying the proceedings*," as the learned judge below calls it.

That the suit at law, the writ of entry upon the mortgage, could be changed to a bill in equity by subsequent legislation is not doubted, care being taken in its provisions not to make it more onerous to either party under the mortgage contract. But the foreclosure by *act in pais* was part of the mortgage contract itself, and no more subject to alteration, or change, by subsequent legislation, than the bonds themselves.

It is believed that this Court has never sanctioned a change, or alteration, in any contract; and no material change or alteration in any remedy existing at the time the contract was made.

Upon this branch of the case, the admissions of the learned Court below that the provisions of the mortgage relating to the foreclosure by *acts in pais* are part of the mortgage contract, "and the rights thereby secured to the bondholders could not be abridged or taken away by subsequent enactments" are important concessions; but it is added immediately after: "The remedy by foreclosure by the trustees, existing when the mortgage of 1871 was given, 'has never been abridged or taken away.'" 88 Me., 91. But the gist of the whole judgment below is that they *were taken away by force of the subsequent enactments*, the instant the new corporation was formed on Aug. 15, 1883. They existed, confessedly, on Aug. 14, 1883 in full force and strength. On Aug. 16, 1883 they had passed to and vested in the "Somerset Railway," a new company with a new name; and the

mortgage of July 1, 1871 had become, *eo instanti, functus officio*, and void, and had "*ceased to be security for the bonds*" described in it; which bonds were declared by the Court to be fully paid, if the railroad property was of sufficient value; and the legal estate of the trustees a "dry trust, with no duties to perform, a cloud upon the title of the Somerset Railway," which, in the language of the Court, "*the trustees must release and transfer.*"

According to this opinion and judgment, the provisions and stipulations of the mortgage relating to the foreclosure, which are admitted by the Court to be secured under the mortgage contract, "and could not be abridged or taken away," are completely set aside by force of subsequent legislation, against the protests of the trustees and of a large minority of the bondholders, \$110,600 against \$324,400,—and the minority forced into a new and hostile corporation not authorized by the terms of the mortgage, nor by any law existing when it was made, and compelled to surrender their bonds, which were first mortgage bonds, for stock in such new corporation.

The decision of this Court in *Knapp v. Western Vt. R. Co.*, 20 Wall., 117, would seem to be decisive of several of the questions raised in the cases at bar, and of the general question under these assignments of error.

"It is conceded on the argument, " said *Mr. Justice Davis*, in delivering the opinion of the Court, "that Knapp & Briggs (the plaintiffs in error,) were trustees of a mortgage upon the property of the Western Vermont Railroad to secure the bonds of the company, and that upon a *strict foreclosure of the mortgage their title became absolute in trust for the bondholders*. After this they leased the road to the defendants (the Troy & Boston R. Co.,) for a term of years, and at the expiration of the lease brought their suit upon the covenants of the lease. It would seem that they not only had the right to sue, but that nobody else could sue. It is said, however that before the expiration of the lease, a new corporation, called the Bennington & Rutland Railroad Company, was organized by a majority of the bondholders of the defunct corporation under the Laws of Vermont who had converted their bonds into stock, and that the new corporation was, by the provision of the statute under which it was formed, substituted as trustee for the other bondholders in place of the plaintiffs in error, and had thus become the real party in this suit. It is not necessary to discuss the question whether the statute of Vermont can bear the construction claimed for it, for manifestly it is not in the power of the State legislature, without the consent of the *cestuis que trust*, to substitute a new trustee in place of the persons named in the mortgage. This would impair the obligation of the contract. To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created. The trustees in this case have not been discharged from

"the obligations of their trust, or divested of their right of action
 "on this lease by judicial proceeding or otherwise, nor has the trust
 "in fact been closed, for there are bonds outstanding which have nev-
 "er been paid, or converted into stock of the new corporation. It
 "can make no difference whether these bonds are few or many. The
 "trust is continued until all are paid, unless in the meantime the
 "trustees are discharged. They are the real plaintiffs in the suit
 "brought to enforce a claim accruing to them in the execution of
 "their trust, as much so as executors and administrators are, who
 "also sue for the benefit of others and not themselves. Like them
 "they control the litigation, and are charged with the responsibility
 "of conducting it."

The plaintiffs in error, in the present suits, most respectfully submit, that if the *names of the trustees* in a railroad mortgage cannot be changed by subsequent legislation, without impairing the obligation of the contract, it is difficult to see how the *title of the trustees and their right to the possession of the whole property*, can be so changed, without similar impairment.

And if, when a *regular foreclosure* according to the terms of the mortgage has taken place, the rights of such bondholders, whether few or many, as do not choose to go into a new corporation formed by other bondholders, are protected by this Court against all invasion until paid, *a fortiori*, it would seem that the rights of such bondholders after a *subsequent statute foreclosure, not authorized by the mortgage*, should at least be equally protected, from impairment which amounts to destruction.

Under the fifth and sixth errors assigned, the plaintiffs submit that certain implied contracts arise and exist between holders of the same class of bonds under the same mortgage. Each is bound to know the conditions, and special stipulations of the mortgage, and impliedly agrees to abide by and carry them out.

In the present mortgage the special stipulations relating to the foreclosure of the mortgage, in case the trustees should adjudicate that there had been a breach of the conditions, were binding upon each bondholder. There was an implied agreement that each should share equally in the income of the property if taken possession of by the trustees, and operated for the benefit of the bondholders; and that each should have his *aliquot part of the mortgaged property* under a foreclosure made in accordance with the provisions of the mortgage; and should have the right to become a member of a corporation formed in accordance with the provisions of the mortgage after foreclosure, if he wished to do so. There was an implied agreement that every bondholder should receive as much *pro rata* on his interest coupons, as they fell due, as every other bondholder, and no more; that nothing should be done by one bondholder to the prejudice of another, or inconsistent with the stipulations of the

mortgage upon which all are presumed to rely for their common security.

That the mode of forming a corporation by the bondholders under the provisions of the mortgage, in case of foreclosure as therein provided, is a contract right secured to every bondholder individually and all bondholders who may wish to avail themselves of it. And that the subsequent attempt of a part of the bondholders, whether a majority or not is immaterial, to get possession of the mortgaged property by forming a new corporation was not authorized by the provisions of the mortgage, but was in violation of them, and of the implied contract existing between themselves and the other bondholders; and that the learned Supreme Court of Maine erred in sustaining the validity of a *subsequent statute which attempted to authorize such violation and impairment.*

Gilfillan v. Union Canal Co., 109 U. S. 403.

Canada Southern R. Co., v. *Gebhard*, 109 U. S. 534, 535

Hall v. Sullivan, 21 *Law Reporter*, 144, 145, 146, 147, 148.

McClelland v. Norfolk R. Co., 110 N. Y. 478, 480.

Batchelder v. Council Grove Water Co., 131 N. Y. 42, 45, 46, 47.

Pennock v. Coe, 23 *How.*, 117.

Under the seventh assigned error, the plaintiffs respectfully insist that the foreclosure of the mortgage of July 1, 1871, under the laws in force when it was executed, would have vested an *absolute legal title* in the trustees, and an *absolute equitable title* in the bondholders; and that *neither title* could be changed or taken away by force of subsequent legislation and made to vest in any corporation not organized, in accordance with the provisions and stipulations of the mortgage.

It would impair the obligation of the mortgage contract. Any other corporation would not be the corporation provided for in the mortgage.

People v. Cook, 110 N. Y. 449.

Hall v. Sullivan, 21 *Law Reporter*, 145.

Knapp v. Railroad Co., 20 *Wall*. 117, 122.

After a foreclosure in accordance with the terms of the mortgage the trustees could be required to convey to a corporation composed of *all* the bondholders.

But they would violate the terms of their trust under the mortgage, if they should attempt to convey to a corporation composed of *one-half* of the bondholders, or of a *majority* of the bondholders. In either case it is not the corporation provided for by the mortgage. No law when the mortgage was made authorized any such conveyance. The majority bondholders were then powerless to force the minority "whether few or many" into a new corporation, and com-

pel them to surrender *first mortgage bonds* for stock in a new and heavily encumbered corporation.

Gillfillan v. Union Canal Co., 109 U. S. 403.

Canada Southern R. Co. v. Gebhard, 109 U. S. 535 and 542.

The mortgage contract which was their protection then, remains their protection still, under the powerful shield of the supreme law of the land.

The rights of all the parties under the mortgage contract were then fixed, and no subsequent state legislation could change them.

To change would be to impair.

Green v. Biddle, 8 Wheat. 84, 85.

Planters' Bank v. Sharp, 6 How. 318, 327, 330.

In the case last cited the Court said: "The question to be considered in this case is, whether an act of the legislature of Mississippi passed Feby. 21, 1840 impaired the obligation of any contract previously entered into with the Planters Bank.

If it did, the clause in the Constitution of the United States "prohibiting a state from passing any such law, has been violated, "and the plaintiffs in error are entitled to judgment."

And the court held that the rights of parties to a contract are fixed and established by the laws existing when the contract is made; that subsequent legislation cannot impair it at all. That "it is not "a question of *degree*, or *manner*, or *cause*, but of encroaching in any "respect on its obligations, *dispensing with any of its force*." And the Court held that the Act of the legislature of Mississippi prohibiting the Planters' Bank from indorsing and transferring its notes to third parties was void, although it did not interfere with the Bank's title to the notes or its right to collect and receive pay for them. Under the provisions of the mortgage of July, 1, 1871, the trustees, after a foreclosure in the manner there provided by law, were to convey, and by the terms of the mortgage *had covenanted to convey* to a corporation of *all* the bondholders, the railroad property.

No *other* corporation, however formed, would come within the terms of *their covenant*; and no court could lawfully require them to break their contract by conveying the property to such *other* corporation. Suppose such an attempt had been made by the majority of the bondholders during the first ten years after July 1, 1871? Would not every court have said that it would violate the provisions of the mortgage?

Is it any less a violation when attempted *under a statute*, two years later?

Yet that is precisely what the defendants in error in their bill in equity asked the Maine Supreme Court to do, and that is precisely what the Maine Supreme Court did—against the dissenting opinion

of *Mr. Justice Emery* and *Mr. Justice Whitehouse* who discuss one branch of the case with great clearness and ability—the right of the bondholders to the income of the road during the three years the mortgage foreclosure is running, which is taken away *eo instanti* under the Court's *statute foreclosure* of Aug. 15, 1883.

Under the mortgage-foreclosure, the bondholders become tenants in common of the railroad property, and as many as wish are entitled to become members of the corporation provided for by the mortgage. No one is obliged to become a member *volens volens*.

Stratton v. European and North Amer. R'y, 74 Me. 424.

Same v. Same, 76 Me. 269, 273, 274.

Knapp v. Railroad Co., 20 Wall. 117, 121, 123.

Bondholders who do not choose to become members, remain tenants in common with the new corporation and are entitled to their share of the income of the road and may sue for it at law, or bring their bill in equity.

Brooks v. Centr. Vt. R. Co., 22 Fed. Rep. 211.

Sage v. Centr. Iowa R. Co., 99 U. S. 339.

Pratt v. Munson, 84 N. Y. 585.

Or must be paid in full or *pro rata* by those who choose to become members of the new corporation under the provisions of the mortgage.

Knapp v. Railroad Co., 20 Wall. 117, 123.

All of these rights, secured to every bondholder under such a foreclosure as the mortgage provides, are radically different from those given to him under and by force of the subsequent legislation, in the "Somerset Railway," to which, by the decree of the court below, he must surrender his *first mortgage bonds*, which he supposed, when he purchased them, to constitute and carry with them the first security on the property, and take in place of them stock in a hostile corporation already encumbered, as the case shows, with \$225,000 of new bonds. As already stated, in another branch of the case, the evidence shows the net income of the road to have been about \$25,000 per year since 1887, of which \$11,250 has been appropriated yearly to pay the interest on these last named bonds which should have been applied, as the plaintiffs in error believe and contend, to the payment of the interest upon the first mortgage bonds of July 1, 1871, falling due July 1, 1891.

It will be noticed that this yearly income during the three years the mortgage foreclosure would run, would be a valuable right indeed—nearly enough to pay the yearly interest upon all of the first mortgage bonds.

Eighth Error.

The provision of the mortgage which makes the trustees the *sole judges* in the first instance of a breach of the conditions, was an exceedingly important one. It qualified materially the preceding statement that "*any omission* of said company to pay any bonds or "coupons as they become due, or to perform any other engagement "herein contained to be performed, shall constitute a breach of the "conditions of this deed." The two sentences, like two parts of any contract, or statute, are to be construed together, giving each its proper effect taken in connection with the other parts of the same contract, and considering its general purposes and objects.

Haven v. Grand Junc. R. Co., 4 Allen, 91.

The trustees are made sole judges whether there has been "*any omission.*" Nobody else is authorized to determine that fact. And without such determination and adjudication by the trustees, there could be no breach of the conditions, and consequently no foreclosure. It is easy to conceive of various contingencies in which the omission to pay the coupons or even bonds, when due, would not in fact be a breach of the conditions. If the road was in the hands of the trustees, they would be bound to apply the income to the payment of the interest until the bonds became due, and if more than enough to pay the accruing interest, the surplus must be applied as advance payment upon the principal. *Wood v. Goodwin, 49 Me. 260.*

Yet until the trustees settled their account, and the application was actually made, the interest would not appear to be paid. So if the trustees should refuse to take possession of the road, after being requested so to do by the bondholders, upon the ground that their personal responsibility and risk would be so great as to be hazardous—which is often done—see 2 Cook on Stockholders, etc., 3rd Ed. sec. 823, page 1315—and a receiver should be appointed. *Warner v. Rising Co., 3 Woods, 514.*

In such cases there would be no breach of condition. So if one or more of the trustees should die, as was actually the fact in the cases at bar, there could be no breach, and no foreclosure until the vacancies were filled, and the trustees had so adjudicated. A majority of the trustees could do no act under the special terms of the mortgage, without the concurrence of, or notice to the other. *Anson, Pet., 85 Me. 88.* And any party to the mortgage at any time was entitled to have such vacancies filled upon application to the court. *85 Me. 79.* But the chief reason for conferring this special and peculiar power upon the trustees was to prevent a hasty or ill-advised foreclosure, and better for all parties to vest in the trustees the power to determine under all the circumstances when a foreclosure would, or would not be advisable; and also when it

would be wise and for the best interests of all parties to accept subsequent performance in case of a breach, rather than foreclose the mortgage. All these powers were expressly conferred upon the trustees by the special provisions and stipulations of Art. 3 and 4 of the mortgage. And the mortgage itself was something more than a mortgage—it created a trust as well. And “it is well settled,” say the Supreme Court of Mass., in *Ellis v. Boston, Hartf. & Erie R. Co.*, 107 Mass. 12, in relation to a similar mortgage “that the person who creates the trust may mould it in whatever form he pleases.”

Every person who bought bonds or stocks was chargeable with knowledge of these provisions of the trust deed, and bound by them and no subsequent legislation could change them. And no legal foreclosure of this mortgage could be had except in strict conformity to these stipulations.

Batchelder v. Council Grove Co., 131 N. Y., 42, 46.

In this case the Court said: “By prescribing the effect which the clause shall have on the contract, and the particular manner in which a default in the payment of interest shall be availed of, it impliedly excludes all other methods, and confines the bondholders to the remedies expressly authorized.”

In *Clelland v. Norfolk R. Co.*, 110 N. Y., 479, the Court said: “Not only the obligor, but each bond and coupon holder is interested in the exercise of the powers referred to, and has the right to insist that the conditions of its exercise provided by the contract, so far as they are material, shall be fully and exactly complied with.”

“Any other construction would place the rights of a minority at the discretion or caprice of a majority, and leave it practically powerless to avail itself of the security provided for it by the plain language of the contract.”

In *Ellis v. Boston, Hartf. & Erie R. Co.*, 107 Mass., 34, the Court said: “The trustees are not officers of the Court, and do not act under its direction. They stand upon their own rights as mortgagees. For the extent and measure of those rights, the instrument of mortgage is the guide.” See also 107 Mass., p. 36 and 37.

In *Green v. Biddle*, 8 Wheat, 84, this Court said: “The objection to a law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.”

More than forty years afterwards this Court quotes this entire sentence and reaffirms its soundness. *Von Hoffman v. City of Quincy*, 4 Wall, 552, 553.

And yet in the opinion of the learned Supreme Court of Maine, although these special provisions in the mortgage of July 1, 1871, relating to the foreclosure, are expressly admitted to be part of the mortgage contract, and cannot be abridged or taken away, this very case of *Hoffman v. City of Quincy* is quoted as authority for sweeping them all away in a single day by force of subsequent legislation.

The admissions by the Court that all of these provisions of the mortgage as to the manner of effecting a foreclosure, are part of the mortgage contract and can not be abridged or taken away, are in accordance with many other decisions of the same Court, and of all the courts of the country.

Phinney v. Phinney, 81 Me., 450, 464, 466.

Me. Pherson v. Hayward, 81 Me., 336.

What is a *foreclosure*? What is its purpose and object? To cut off the mortgagor's right to redeem, secured to him under and by the contract and laws existing when the contract was made.

It can be cut off only in the manner provided by the contract. It cannot be shortened a day by the court or by any subsequent statute.

Cases Supra.

Nor can the rights of the mortgagee be affected by any subsequent act of the mortgagor, or those claiming under him.

Toledo R. Co. v. Hamilton, 134 U. S., 299, 300.

George v. Wood, 9 Allen, 84.

Nor can this right be shortened or lengthened a day by subsequent legislation.

Phinney v. Phinney, supra.

The admissions of the learned court below, and their *previous* and *subsequent* decisions, are fatal to the validity of their judgment in the cases at bar. If the rights of the mortgagee and of the mortgagor are fixed by the mortgage contract; if the mortgagee is entitled to the possession and income of the road while the three years of the impending foreclosure are running; and if the mortgagor is entitled to the last day of his three years to redeem, how can all of these rights, or any of them be changed, and cut off by subsequent legislation in a single day, under the guise of a change of remedy? And how can a subsequent statute actually change and "transfer" the title and the property from the trustees and the *cestuis que trust, eo instanti*, to third persons, "without the intervention of the trustees, thus simplifying the proceedings?" The plaintiffs in error deny it.

No better answer to the whole opinion of the learned court below,

including its favorable comments upon the attempted foreclosure by bill in equity, than is to be found in the opinion and judgment of the same learned Court six years previously in the case already cited. *Phinney v. Phinney*, 81 Me., 466.

In the opinion delivered by Mr. Justice Foster, a learned, able and careful judge, it is said: "It will be noticed that in these decisions (referring to cases in Wisconsin and Iowa and Conn.,) the foreclosure was under proceedings in equity where the Court of Chancery was authorized to decree foreclosure,—a proceeding which has never existed in this State. *K. & P. R. R. Co. v. P. & R. R. Co.*, 59 Me., 31.

"As we have remarked, foreclosure in one of the modes provided by law is fixed by positive statute enactments, and does not depend upon any decree of the chancellor. It is not subject to that decree of flexibility, both as to time and process, which exists in jurisdictions where foreclosure proceedings are relegated to courts of equity. The remedies there are more elastic than under a system where the time of redemption is known and understood to be for a fixed and definite term. So long as we maintain that the remedy furnished by the laws at the time the contract is entered into, constitutes a part of the obligation, (*Walker v. Whitehead*, 16 Wall, 314,) so long must we see that it is not materially impaired by any disguise of remedial legislation. The doctrine of remedy must not affect the doctrine of rights.

"The act (of the legislature,) in question," he continues, "abrogates a right which the defendant had as mortgagee, at the time the mortgage was given, of a fixed and definite period for the foreclosure of the mortgagor's equity." And the act was pronounced void.

The same doctrine established by the Supreme Court of Mass., in a late decision, *Hallowell v. Ames*, 165 Mass., 124, 125.

While in the opinion of the learned court below in the present cases, the contract rights of the trustees, and of the *cestuis que trust*, and of the mortgagors, are allowed to be swept away by a single stroke of subsequent legislation, the same learned judge in delivering the opinion of the same court in a subsequent case in the same volume of reports, holds that a right secured by a statute, (an attachment of property upon a writ,) cannot be taken away, by a subsequent statute, because it would impair the obligation of the contract in the suit upon which the attachment was made.

Peabody v. Stetson, 88 Me., 281.

In a still later case the same court said: "No legislative act can make invalid a provision in an existing contract otherwise valid."

Kimball v. Accident Asso., 90 Me., 185.

If the principles announced in *Phinney v. Phinney*, 81 Me., 466, in *Mc. Pherson v. Hayward*, 81 Me., 386, in *Anson et als.*, Pet., 85 Me., 76 and in *Peabody v. Stetson*, 88 Me., 281, are sound, it is not

easy to see how the doctrine and reasoning of the court in the cases at bar 88 *Me.*, 86 and 101, can be supported. The two decisions of the Court upon the same facts, 85 *Me.*, 79, and 88 *Me.*, 86, are directly contrary to each other. *One must be unsound law.* If we look at the great leading cases in the Supreme Court of the United States, for light, *Bronson v. Kinzie*, 1 *How.*, 311, and *Brine v. Insurance Co.*, 96, *U. S.*, 627, the solution of the question would not seem to be difficult.

If we look also at the decisions in the courts of other States, the result is the same.

Weeks v. Boynton, 37 *Vermont*, 297, is a striking case directly in point.

In *Randolph v. Middleton*, 26 *N. J. Eq.*, 543, where the mortgage provided that upon the default of interest the principal of all the bonds should, at the election of the trustees, become immediately due and payable, and the trustees had not so elected, the subsequent foreclosure proceedings and sale upon the petition of others besides the trustees, were held void; and a statute passed after the mortgage was given authorizing such foreclosure and sale was held invalid as impairing the obligation of the mortgage contract.

The plaintiffs in error respectfully submit that the learned Supreme Court of Maine, while admitting that the provisions and stipulations of the mortgage, and of the law existing when it was made relating to the foreclosure of the mortgage, were part of the mortgage contract, erred in not giving them any effect. and in holding that they could be taken away and annulled by a subsequent statute. And they further submit that these provisions and stipulations provided the only mode by which a legal foreclosure of the mortgage could be had, and that the learned Supreme Court of Maine erred in not holding the subsequent legislation void as impairing the obligation of the mortgage contract; and that instead of sustaining the bill in equity of the defendants in error, whose only title to the property was confessedly given them by such subsequent statute, they should have dismissed it.

Under the ninth assigned error, the plaintiffs respectfully refer to the considerations and authorities already called to the attention of the Court.

They suggest that the decision of the Court in *Knapp v. Railroad Co.*, 20 *Wall.* 117, in principle covers the present cases. It is true that, in that case, these was a legal, and not a statute-foreclosure, but in all other respects the cases seem to be substantially alike in principle. The encroachment upon the mortgage by subsequent legislation which the Court in that case condemned as impairing the mortgage contract, was in transferring the names of the trustees to a new corporation; while in the cases at bar, the property of the trustees is thus transferred to a new corporation. And no reason is

perceived why it could not in the same way be transferred to a natural person, or several of them, if such had been the will of the legislature. In the present cases, the *statute-foreclosure* was held by the learned Court below to change *first mortgage bonds into stock* of a new and hostile corporation, not authorized by, but wholly inconsistent with, and in entire disregard of, the provisions of the mortgage, and of course subjected them to an issue of bonds by the new corporation for \$225,000.

The remarks of the learned judge on pages 92 and 93 that "it is too late for the trustees, or dissenting bondholders, now to object to technical irregularities if any exist; especially as the Somerset Railway has since extended the railroad from North Anson to Bingham a distance of about sixteen miles, built a branch road of one mile, etc., and placed a mortgage of \$225,000 upon the road, etc. Their long acquiescence without objection, coupled with the changed conditions and relations *resulting from the possession and management of the property by the Somerset Railway*, estops them from now questioning the legality of the organization of the new corporation,"—these statements, under the circumstances, were simply *dicta*. If the statute-foreclosure was valid—if, as he had already announced, the entire equitable title of all the bondholders under the mortgage of July 1, 1871, was transferred, by force of it, to, and vested in, the new corporation on Aug. 15, 1883, leaving nothing but a "*dry trust*" in the trustees, which they were required in this same opinion to release and convey to the new corporation, then a good title was acquired by the new corporation, and no subsequent *laches* by any body could affect it. If, on the other hand, as the plaintiffs in error, the trustees under the original mortgage contend, the whole proceedings under the subsequent statute were a nullity because impairing the obligation of the mortgage contract then no laches could exist on the part of the trustees or bondholders who relied, and had a right to rely, upon the protection afforded them by the supreme law of the land. Their mortgage was duly recorded which was notice to all the world of their rights.

Toledo R. Co. v. Hamilton, 134 U. S. 299.

Jordan v. Cheney, 74 Me., 361.

A void title, originating under void legislation could never ripen into any validity as against such recorded mortgage and the rights secured by it. The party who proposed to purchase the bonds of the new corporation was bound to inquire into its authority to issue them. His inquiry would at once lead him to their records, and to the law under which it professed to be formed, and he would at once learn that it was formed by part of the bondholders under the mortgage of July 1, 1871, but not in accordance with the provisions of the mortgage. He examines the records and finds that no foreclosure of it has ever been made by the trustees, who, by its express provisions, are made *sole judges* of a breach of its conditions. He finds no notice of foreclosure recorded in the county registries. He finds the bonds under the mortgage not yet due by several years.

He learns from the record of the mortgage and from the law in force when it was made, which he is bound to take notice of, that a majority of the bondholders had no power, either with, or without a foreclosure, to form a new corporation, and force the minority into it, so as to give the new bonds of the new corporation precedence over the *first mortgage* bonds. And he would be bound to know, whether lawyer or layman, that no subsequent statute could change this mortgage contract, and transfer the title created by it to new trustees who sign the new bonds, or to the new corporation.

He would also learn, upon inquiring for the trustees under the first mortgage, thinking perhaps that they could tell him better than anybody else what the actual situation was, that one of the trustees died more than three years before any attempt to issue the new bonds; and that as the remaining trustees, by the express provisions of the mortgage, could do no act whatever relating to the mortgaged property, the rights of all parties were in abeyance until the vacancies were filled. He could learn that the same majority of bondholders could, at any time during said three years, have caused the vacancy in the board of trustees to be filled, and that their delay in doing so placed them upon exactly the same level with the minority neither gaining any lawful advantage over the other. He would therefore learn abundantly enough to put him upon his guard, and charge him with full notice of the actual situation, and of the invalidity of the new bonds.

And if some bondholder under the mortgage of July 1, 1871, of the hundreds scattered over the state and through New England and Canada, surprised because he failed to receive his interest when due, made similar inquiries, he would obtain the same information, and would feel himself amply protected by the record of his mortgage, and by his belief that his *quasi* partners, the other bondholders could do him no harm, and must be accountable to him upon settlement of the income of the road; and that eventually like nearly all other railroad investments in Maine, this one in the end, might prove to be safe and profitable. He had a right to rely upon the implied agreement between the other bondholders and himself, that nothing should be done to his prejudice. His bonds were not due, and would not be for years to come. He had a right to rely upon the stipulations in his mortgage that there could be no foreclosure of it until the trustees had decided that there had been a breach of its conditions, and deemed a foreclosure advisable; or had been asked by at least one-third of the bondholders to foreclose it.

He had a right also to rely upon the right secured to him under the mortgage of becoming a member of a corporation owning all of the mortgaged property in case of a legal foreclosure under its provisions. He understood the law of Maine to be that his mortgage being duly recorded, nothing could affect it but payment, or the statute of limitations.

Parkhurst v. Cummings, 56 Me. 159.

Bunker v. Barrow, 79 Me. 52.

The plaintiffs therefore respectfully submit that the remarks of the learned judge below suggesting laches on the part of the trustees or minority bondholders were simply *dicta*. His decision would have been just the same, had all these remarks been left out of the opinion. The new corporation, the "Somerset Railway," acquired a valid title to the railroad property, *eo instanti*, on its organization under the statute of March 6, 1883, or it never did. If it did, no laches could make it any better.

If it did not, no laches could make a valid title out of a void statute—a nullity. With all the due deference to the learned Supreme Court of Maine, and to the learned and able judge who prepared its opinion in the cases under consideration, the plaintiffs in error submit with great confidence that from the very nature of the situation there *could* be no laches on the part of anybody. Each party stood upon what it claimed to be its legal rights, the trustees and minority bondholders upon their *mortgage contract*; the majority bondholders, the defendants in error, upon *their statute*.

In the vote of the latter on May 11, 1887, to complete the organization of the new corporation after procuring the passage of the act of April 11, 1887, is the following recital: "Whereas the mortgage given to secure bonds on which this corporation was formed dated the first day of July, A. D. 1871, was by a decree of the Supreme Judicial Court of the state upon due proceedings thereon, finally foreclosed on the first day of April, A. D. 1887. And whereas under the statute in such case made and provided such foreclosure inured for the benefit of this corporation." (Record, page 58.)

This is the exact language of the act, the passage of which they had procured just one month before.

And this is the exact language of Par. 10 in the present bill in equity of the defendants in error. (Record, p. 12.) And as no other amendatory or additional act had been passed by any legislature after the act of 1883 until the act of April 11, 1887, no other could have been intended, or referred to.

Here was a square declaration that the majority bondholders claimed that the mortgage had been foreclosed, and that title under the foreclosure had vested by statute in the new corporation, which was themselves. They asked no favors of the minority—extended no invitation to them at any time, and did not intend to. The whole proceeding was got up to get rid of them. If they had wanted an honest and fair reorganization for the benefit of all the bondholders, the mortgage provided how it could be had through the trustees; and the Dunns and Ayer controlled more than enough bonds to compel a foreclosure through the trustees.

If now we look to see *who claims laches*, we shall find these same parties, who so defiantly claimed title to the whole property immediately after the statute of April 11, 1887.

If we look at their bill in equity filed to obtain the foreclosure under their act of March 6, 1883, we shall find a statement in it *under oath* that in the year 1875, only \$920.50 of interest coupons was paid in all on the first mortgage bonds; (Record, p. 82,) while the treasurer of the Somerset Railroad Co., their own clerk and book-keeper, testifies that he paid to them, and they received, (Dunn, and the Dunn Edge Tool Co.,) \$7,186.00 of interest coupons, (Record, p. 125,) without the knowledge, so far as appears, of any other bondholders. (Record, p. 9.)

When we note that these men at the time were all officers of the Somerset Railroad Company, John Ayer its president, A. R. Small its treasurer, Reuben B. Dunn and R. Wesley Dunn, directors, men who were *quasi trustees*, who owed a duty to protect the road to the extent of their power, and to save it from foreclosure if possible, and who were forbidden by law, and by every moral sense to depreciate its credit, or its bonds, or even to purchase them at a discount:—

Wardwell v. Union Railway Co., 103 U. S. 651.

Duncomb v. N. Y. Housatonic & Northern R. Co., 84 N. Y. 190.

Drury v. Cross, 7 Wall., 302.

When we take into account that these were the *only* men who filed the bill in equity in 1883 to *foreclose the very mortgage which it was their duty to protect from foreclosure*, we might well expect the cry of laches.

The running rogue is always the party who cries "Stop thief." That there was no laches and in the nature of things could be none, was distinctly held by the Maine Supreme Court in its *first decision*, when, after full argument, upon the same facts, and upon every ground now urged in the present suits, it decided to appoint trustees to enforce the mortgage for the benefit at least of \$58,000.00 of the bonds, and of as many more as should ultimately be found, under the proceedings of the trustees, to be entitled to its security. *Anson et als., Pet.*, 85 Me., 87.

And it is supposed that this Court will exercise its own judgment upon a question of laches, especially when connected with Federal questions.

If a State Court, by a suggestion of laches, could deprive a party of the right secured to him under the Federal Constitution, such right would many times be valueless.

Planters' Bank v. Sharp, 6 How., 326, 327.

Scott v. McNeal, 154 U. S. 45.

In closing this argument under the errors assigned, the plaintiffs desire to call the attention of the Court to the opinion of the Court below in No. 185, reported in 88 Me. R., 102 and 103.

The same learned judge held that the new corporation, the

Somerset Railway, by force of the subsequent legislation in 1883, had acquired the rights of the mortgagees and trustees under the mortgage of July 1, 1871, without foreclosure, so that the trustees could sustain no action to recover the property. He admits the prior title of the trustees under the mortgage contract of July 1, 1871, and holds that it was divested and transferred to the Somerset Railway by force of the statute passed twelve years afterwards. He refers to his opinion in the previous case for the discussion of the rights of the parties. In that opinion he holds that without any act of the trustees, and without foreclosure of the mortgage a subsequent statute has deprived them and the *cestuis que trust* under them, of the property and right of possession; thus stating again the same Federal question which underlies the whole case.

And the plaintiffs in error close this argument by saying as in its commencement, that they are unable to find any case like it. From *Bronson v. Kinzie*, 1 *How.*, 311 down to *Barnitz v. Beverly*, 163 *U. S.* 118, they find many statutes of the States extending, or changing, some right, or provision, or stipulation of a mortgage contract, or other contract, upon all of which this Court has steadily set its seal of disapproval. But the cases at bar are the only ones found in which a subsequent statute has *attempted* to take away the whole right or title created by a previous contract.

D. D. STEWART,

H. B. CLEAVES,

of Counsel for Plaintiffs in error.

DISSENTING OPINION BY MR. JUSTICE EMERY, CONCURRED
IN BY MR. JUSTICE WHITEHOUSE.

This controversy seems to be exclusively between two sections of the first mortgage bondholders under the Somerset Railroad Company mortgage of 1871. The trustees are mere dummies. The original Railroad Company does not care.

The controversy is on the rights of the individual bondholders.

At the time the bonds and mortgage were executed and delivered in 1871, the rights of each individual bondholder (in case of default) by the terms of the mortgage and statute were substantially as follows: He could require the trustees to call a meeting of the bondholders. At such meeting a majority of the bondholders present could determine whether the trustees should take possession of the road and operate it for the benefit of the bondholders. (The alternative would probably be a receiver.) In such event the net earnings of the road, if any, went direct to the bondholders. There was no power to extend the road, or saddle it with new mortgages. The individual bondholders were entitled to the earnings of the road as it was.

One-third of the bondholders could require the trustees to foreclose the mortgage in the manner named in the statute. When this was done, and the statute foreclosure completed, then and not till then the holders of the bonds and coupons became *ipso facto* a corporation, entitled to a conveyance from the trustees, and empowered to all the powers of the original railroad corporation. Of course this new corporation could by legislative authority give a new first mortgage and delay its stockholders, the original bondholders behind the new bonds. Until such statute foreclosure however, there could be no new corporation, no new mortgage. Each bondholder was interested as tenant in common, entitled to his *pro rata* share of the earnings, and not liable to have this right postponed to new bonds without his consent. *Brooks v. Vt. Cent. R. R. Co.*, 22 *Fed. Rep.* 211, 11. After the mortgage and the bonds of 1871 had been issued and purchased, and the rights of the holders had become fixed, the legislature in 1876 and 1878 provided that the bondholders under railroad mortgages might become a corporation at any time after default, when more than one-half should so elect in writing. A majority of the bondholders could at once after default turn all the bondholders into stockholders without any action by the trustees whatever when the majority so determined this could be done, and then as majority stockholders could require of the trustees a conveyance of their interest in the property. They could then with legislative authority make new mortgages and bonds

and place them ahead of the rights of the original bondholders now become stockholders. Provision was also made for other modes of foreclosing the original mortgage in other ways than those provided in the statute of 1871.

The difference between the original and subsequent legislation seems to be this. Under the original the bondholder was not liable to come under the yoke of the majority in a new corporation until after a foreclosure had been completed by the trustees in the statute mode. Until that moment he retained his separate individual rights as a bondholder to his *pro rata* share of the earnings. This time would be at least three years. Under the subsequent legislation, the bondholder was liable to come under the yoke of the majority at once after default without any foreclosure and be postponed to new mortgages and bonds.

When the default upon these bonds occurred no steps were taken by any bondholder nor by the trustees under the law of 1871, in force at the time of the issue. Instead of those steps a majority of the bondholders proceeded under the subsequent statutes. They elected in writing to form a new corporation, and did form one (if they legally could). This new corporation did not procure any conveyance of the property from the trustees, but ignored them and itself took possession of the road and operated it, foreclosed the mortgage in the new modes, and have assumed to make a new mortgage and bonds to be a first lien on the property.

A part, a minority of the bondholders held aloof from these proceedings and now resist this bill on the ground that their rights were fixed by the mortgage and statute of 1871, and were not and could not be changed without their consent by the subsequent legislation and proceedings under it. They insist that until a completion of the foreclosure by the trustees, the possession of the road should be held by the trustees, and the net earnings of the original road belongs to the individual bondholders and cannot be sunk in any new mortgage. They insist that only a new corporation formed after a foreclosure by the trustees can subject the property of the bondholders to new incumbrances.

The decisive question seems to be whether the subsequent legislation binds the unwilling or non-assenting bondholders. It is a Federal question which probably will finally go to the U. S. Supreme Court.

I do not think the cases cited in the opinion as to the constitutionality of a change of remedy apply. This is not a question of remedy between obligees and obligors. It is a question of right between individual bondholders. Under the statute of 1871 a bondholder could remain such until after a full statute foreclosure by the trustees, only then did he change into a stockholder liable to have a new lien or mortgage super-imposed against his will upon his interests in the property. Under the subsequent legislation he could be changed into a stockholder at once after default against his consent, and be made to submit to a new and superior lien upon his property.

The rights and situation of the individual first mortgage bondholder are plainly different from those of the individual stockholder. Any legislation that assumes to turn the rights of a first mortgage bondholder into those of a stockholder before the time appointed in the bond, mortgage and original statute seems to assume to effect a change in rights, as well as in remedies.

In *Green v. Biddle & Wheat*, 1, it was stated broadly that any statute postponing or accelerating a date named in a contract or imposing or dispensing with conditions, however apparently immaterial, impairs the obligations of the contract.

In *Gilfillan v. Union Canal Company*, 109 U. S. 401, it was said that each bondholder under such a mortgage as this "enters by fair implication into certain contract relations with his associates." In that case the subsequent statute did not assume to bind unwilling bondholders, but enacted that such bondholders as did not expressly dissent after being notified, should be held to assent. The court held that the requirement of an expression of dissent upon request did not impair the obligation of the contract between the bondholders.

In *Canada Southern R. R. Co. v. Gebhard*, U. S. 109, 537, the subsequent statute authorizing a different plan of re-organization was enacted by the Canadian Parliament for a Canadian road. The Court held the constitutional restraint against legislation impairing the obligation of contracts did not affect Canadian legislation. The majority opinion seems to intimate and the dissenting opinion of Justice Harlan almost declares that subsequent legislation by the states of the Union changing the mode or time of re-organization would be void against any non-assenting bondholder.

In *Hollister v. Stewart*, 111 N. Y. 644, there was an effort to organize the bondholders into a corporation earlier and in a different way from that prescribed in the mortgage. The Court used vigorous language in declaring that each bondholder's rights were fixed and could not be varied without his consent. Though no subsequent statute was involved, the language of the Court would indicate that such a statute could have no force.

It is familiar law that where the right to amend, etc., the charter of a corporation has not been reserved by the legislature, no subsequent legislation can bind a stockholder to any change in the charter not originally within the power of the corporation itself to make. In other words in the absence of such reserved power the legislature cannot increase the power of the corporation as against its stockholders, cannot increase the power of the majority over the minority. *Lowenthal v. Rubber Co.* 28 At. R. 454 (N. J. Eq.) citing the Maine cases in 77 and 79 Me. of the Belfast Railroad Company. Under this principle can the legislature change the rights of bondholders or increase the power of the majority of them over the minority?

The opinion of our Court in *Phinney v. Phinney*, 81 Me. 450, has set the tune pitch well up in defending contract and statute

rights against subsequent legislation. It is very comprehensive in scope.

The opinion in this case at bar seems to rely much upon the laches of the minority bondholders. Laches I understand to be an equitable defence to an effort to secure equitable relief. A defendant in an equity suit may interpose the laches of the plaintiff. In the short time at my disposal I have not found a case where the laches of a defendant have been held to be a ground for a bill in equity against him. I have not found that laches is a defense to a suit at law. Estoppel and the statute of limitations are common defenses to such suits, but laches never as I remember. Laches is invoked in equity only, and there by the defendant against the plaintiff. Here the defendants are not seeking equitable relief. They are only insisting on their rights enforceable at law; rights which if they ever had them they can be barred of only by release, estoppel or the statute of limitations.

But are they guilty of laches? We have already lately adjudicated that there was a subsisting trust requiring trustees. We have lately sustained a bill by those same minority bondholders for the appointment of trustees to fill vacancies and keep the trust alive.

Should we have granted them this relief if they had been guilty of laches? If they had forfeited by laches their rights under the trust? If they were no longer bondholders with rights as such, but had become absorbed in the new corporation?

Was not the time they came into equity praying for a recognition of their status as bondholders the time to declare them guilty of laches? Have we not gone too far in advance to get behind the tree of laches.

But what have the minority done? Have they done more than simply rest on their rights under the mortgage and statute of 1871? They have never been put to any election as in Gilfillan's case, 109 U. S. 401. They have never consented, at least some of them have not.

What were they bound to do? Anything more than was named in the mortgage and statute of 1871? There is nothing in either requiring them to do anything. They could lie supine if they preferred, and let the old company continue to operate the road. No mortgagee, nor mortgage bondholder is bound to do anything not named in bond mortgage or statute.

It does not appear that all the bondholders knew what was being done by the majority under the subsequent legislation. Until that does appear they cannot be estopped. But suppose all did know? Was any duty thereby imposed on them? A part of their number were essaying to form a corporation at an earlier date, and in a different way from that named in the contract. Were those who did not take part in this attempt under any duty about it? In Gilfillan's case they were asked to say "yes" or "no" to it, but no such question was asked them here. Upon their non-appearance at the meeting for organization they were ignored and the proceedings

went on without them. Were they bound to "holler" to save their rights? Could they not rest on their mortgage and statute and rest quietly until they found it for their interest to move?

What is the use of contracts, statutes and constitutions, if the citizen is to forfeit his rights by holding his tongue and minding his own business, for any time short of the statute of limitations?

I have a notion that the U. S. Supreme Court when this case goes to them, will say that the rights of the individual bondholders under the mortgage of 1871 have not been lost by any laches, and cannot be changed by the subsequent legislation; that they have rights as bondholders still, and that the trustees are trustees for them as well as for the new corporation.

CHAPTER 465.

AN ACT TO INCORPORATE THE SOMERSET RAILROAD COMPANY.

Be it enacted by the Senate and House of Representatives in Legislature assembled as follows:

SECT. 1. George C. Getchell, William R. Flint, Franklin Smith, S. W. Hapgood, Bradbury T. Dinsmore, O. R. Bachelder, Edmund Coolidge, Thaddeus Boothby, Edgar Hilton, Benjamin Hilton, Jonas M. Hilton, Nathan Wood, Nathan Weston, Rufus Bixby, John S. Abbott, Dennis Moore, David Danforth, Edmund Rowe, Stephen D. Lindsey, their associates, successors and assigns, are hereby made and constituted a body politic and corporate, by the name of the Somerset Railroad Company, and by that name may sue and be sued, plead and be impleaded, and shall have and enjoy all proper remedies at law and in equity to secure and protect them in the exercise and use of the rights and privileges, and in the performance of the duties hereinafter granted and enjoined; and to prevent all invasions thereof or interruptions in exercising and performing the same. And the said corporation are hereby authorized and empowered to locate, construct and finally complete, alter, keep in repair, a railroad with one or more sets of rails or tracks, with all suitable bridges, tunnels, viaducts, turnouts, culverts, drains, and all other necessary appendages, from some point in the County of Somerset, at or near Caritunk Falls, on either side of the Kennebec River; thence down the valley of the Kennebec River through either of the towns adjacent to said river, passing through the villages in the towns of Anson and Norridgewock, and through Fairfield to the town of Waterville, in the county of Kennebec, with the right to connect with the Androscoggin and Kennebec or Somerset and Kennebec Railroads in the town of Waterville. And said corporation shall be and hereby are invested with all the powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this act as herein

set forth. And for this purpose, said corporation shall have the right to purchase or to take and hold so much of the land and other real estate of private persons and corporations as may be necessary for the location, construction, and convenient operation of said railroad; and they shall also have the right to take, remove and use, for the construction and repair of said railroad and appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken; provided however, that said land so taken, shall not exceed six rods in width, except where greater width is necessary for the purposes of excavation or embankment; and provided, also, that in all cases said corporation shall pay for such lands, estate or materials so taken and used, such price as they and the owner or respective owners thereof may mutually agree on; and in case said parties shall not otherwise agree, then said corporation shall pay such damages as shall be ascertained and determined by the county commissioners for the county where such land or other property may be situated, in the same manner and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways. And the land so taken by said corporation shall be held as lands taken and appropriated for highways. And no application to said commissioners to estimate said damages shall be sustained, unless made within three years from time of taking such land or other property; and in case such railroad shall pass through any wood lands or forests, the said company shall have a right to fell or remove any trees standing therein, within four rods of such road which by their liability to be blown down or from their natural falling, might obstruct or impair said railroad, by paying a just compensation therefor, to be recovered in the same manner as provided for the recovery of other damages in this act.

SECT. 2. The capital stock of said corporation shall consist of not less than one thousand nor more than six thousand shares, and the immediate government and direction of the affairs of said corporation shall be vested in nine, eleven or thirteen directors who shall be chosen by the members of said corporation in the manner hereinafter provided, and shall hold their office until others shall have been duly elected and qualified to take their place, a majority of whom shall form a quorum for the transaction of business, and they shall elect one of their members to be president of the corporation and shall have authority to choose a clerk who shall be sworn to the faithful discharge of his duty; and a treasurer who shall be sworn and also give bonds to the corporation with sureties to the satisfaction of the directors in the sum not less than ten thousand dollars for the faithful discharge of his trust.

And for the purpose of receiving subscription to the said stock, books shall be opened under the direction of the persons named in the first section of this act at such time as they may determine in the towns of Solon, Anson, Madison, and Norridgewock and elsewhere as they shall appoint to remain open for five successive days at least, of which time and place of subscription public notice shall

be given in one or more of the newspapers printed in the county of Somerset, ten days before the opening of such subscription. And any seven of the persons named in the first section of this act are hereby authorized to call the first meeting of said corporation for the choice of directors and organization, by giving notice in one or more newspapers published as above named, of the time and place and the purposes of such meeting at least fourteen days before the time mentioned in such notice.

SECT. 3. When said corporation shall take any land or other estate as aforesaid of any infant, person non compos mentis, or feme covert whose husband is under guardianship, the guardian of such infant or person non compos mentis and such feme covert with the guardian of her husband shall have full power and authority to agree and settle with said corporation for damages or claims for damages by reason of taking such land and estate as aforesaid and give good and valid releases and discharges therefor.

SECT. 4. The president and directors for the time being are hereby authorized and empowered by themselves or their agents to exercise all the powers herein granted to the corporation for the purpose of locating, constructing and completing said railroad and for the transportation of persons, goods and property of all descriptions and all such powers and authority for the management of the affairs of the corporation as may be necessary and proper to carry into effect the objects of this grant, to purchase and hold land, materials, engines and cars, and other necessary things in the name of the corporation for the use of said road, and for the transportation of persons, goods and property of all descriptions; to make such equal assessment from time to time on all the shares in said corporation as they may deem expedient and necessary in the execution and progress of the work, and direct the same to be paid to the treasurer of the corporation. And the treasurer shall give notice of all such assessments; and in case any subscriber or stockholder shall neglect to pay any assessment on his share or shares for the space of thirty days after such notice is given as shall be prescribed by the by-laws of said corporation, the directors may order the treasurer to sell such share or shares at public auction, after giving such notice as may be prescribed as aforesaid, to the highest bidder, and the same shall be transferred to the purchaser, and such delinquent subscriber or stockholder shall be held accountable to the corporation for the balance if his share or shares shall sell for less than the assessments due thereon, with the interest and costs of sale, and shall be entitled to the overplus, if his share or shares shall sell for more than the assessments due with interest and costs of sale; provided however, that no assessment shall be laid upon any shares in said corporation of a greater amount in the whole than one hundred dollars.

SECT. 5. A toll is hereby granted and established, for the sole benefit of said corporation, upon all passengers and property of all descriptions which may be conveyed or transported by them upon said road at such rate as may be agreed upon and established from

time to time by the directors of said corporation. The transportation of persons and property, the construction of wheels, the form of cars and carriages, the weights of loads, and all other matters and things in relation to said road, shall be in conformity with such rules, regulations and provisions as the directors shall from time to time prescribe and direct.

SECT. 6. The legislature may authorize any other company or companies to connect any other railroad or railroads with the railroad of said corporation at any point on the route of said railroad. And said corporation shall receive and transport all persons, goods and property of all descriptions which may be carried and transported to the railroad of said corporation on such other railroads as may be hereafter authorized to be connected therewith, at the same rates of toll and freight as may be prescribed by said corporation, so that the rates of freight of toll of such passengers, goods and other property as may be received from such other railroads so connected with said road as aforesaid shall not exceed the general rates of freight and toll on said railroad received for freight and passengers at any of the deposits of said corporation.

SECT. 7. If said railroad in the course thereof shall cross any private way, the said corporation shall so construct said railroad as not to obstruct the safe and convenient use of such private way; and if said railroad shall in the course thereof cross any canal, railroad, or other highway, the said railroad shall be so constructed as not to obstruct the safe and convenient use of such canal or highway, and the said corporation shall have power to raise or lower such highway or private way, so that the said railroad if necessary may conveniently pass over or under the same, and erect such gate or gates thereon as may be necessary for the safety of travelers on said railroad, highway, or private way, and shall keep all bridges and embankments necessary for the same in good repair.

SECT. 8. Said railroad corporation shall erect and maintain substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through enclosed or improved lands, or lands that may be hereafter improved.

SECT. 9. The said corporation shall at all times when the postmaster general shall require it, be holden to transport the mail of the United States, from and to such place or places on said road as may be required for a fair and reasonable compensation. And in case the corporation and the postmaster general shall be unable to agree upon the compensation aforesaid, the legislature of the state shall determine the same. And said corporation after they shall commence the receiving of tolls, shall be bound at all times to have said railroad in good repair, and sufficient number of suitable engines, carriages and vehicles for transportation of persons and articles, and be obliged to receive at all proper times and places and convey the same when appropriate tolls therefor shall be paid or tendered; and a lien is hereby created on all articles transported for said tolls. And said corporation fulfilling on its part all and singular, the several obligations and duties by this section imposed

and enjoined upon it, shall not be held or bound to allow any engine, locomotive, cars, carriages or other vehicles for the transportation of persons or merchandise to pass over said railroad, other than its own furnished and provided for that purpose as herein enjoined and required; provided, however, that said corporation shall be under obligations to transport over said road the passenger and other cars of any other incorporated company that may hereafter construct a railroad connecting with that hereby authorized, such other company being subject to all the provisions of the fifth and sixth sections of this act as to rates of toll and other particulars enumerated in said sections.

SECT. 10. If any person shall wilfully and maliciously or wantonly and contrary to law obstruct the passage of any carriages on said railroad, or in any way spoil, injure or destroy said railroad or any part thereof or anything belonging thereto or any materials or implements to be employed in the construction of or for the use of said railroad, he, she, or they, or any person or persons assisting, aiding or abetting such trespass shall forfeit and pay to said corporation for every such offence treble such damages as shall be proved before the justice court or jury, before whom the trial shall be had to be sued for before any justice or in any court proper to try the same by the treasurer of the corporation or other officer whom they may direct to the use of said corporation. And such offender or offenders shall be liable to indictment by the grand jury of the county within which trespass shall have been committed for any offence or offences contrary to the above provisions; and upon conviction thereof before any court competent to try the same shall pay a fine not exceeding five hundred dollars to the use of the state or may be imprisoned for a term not exceeding five years at the discretion of the court before whom such conviction may be had.

SECT. 11. Said corporation shall keep in a book for that purpose a regular account of all their disbursements, expenditures and receipts, and the books of said corporation shall at all times be open to the inspection of the governor and council, and of any committee duly authorized by the legislature, and at the expiration of every year the treasurer of said corporation shall make an exhibit under oath to the legislature of the profits derived from the income of said railroad.

SECT. 12. All real estate purchased by said corporation for the use of the same under the fourth section of this act shall be taxable to said corporation by the several cities, towns and plantations in which said land lies in the same manner as lands owned by private persons and shall in the valuation list be estimated the same as other adjacent lands of the same quality in such city, town or plantation and not otherwise, and the shares owned by the respective stockholders shall be deemed personal estate and be taxable as such to the owners thereof in the places where they reside and have their homes. And whenever the net income of said corporation shall have amounted to ten per cent. per annum upon the cost of the road and its appendages and incidental expenses, the directors

shall make a special report of the fact to the legislature, from and after which time one moiety or such other portion as the legislature may from time to time determine of the net income of said railroad accruing thereafter over and above ten per cent. per annum first to be paid to the stockholders shall annually be paid over to the treasurer of said corporation as a tax in the treasury of the state for the use of the state; and the state may have and maintain an action against said corporation therefor to recover the same; but no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises.

SECT. 13. The annual meeting of the members of said corporation shall be holden on the first Monday in January, or such other day as shall be determined by the by-laws at such time and place as the directors for the time being shall appoint, at which meeting the directors shall be chosen by ballot, each proprietor by himself or proxy being entitled to as many votes as he holds shares, and the directors are hereby authorized to call special meetings of the stockholders whenever they shall deem it expedient and proper, giving such notice as the corporation by their by laws shall direct.

SECT. 14. If the said corporation shall not have been organized and the location according to actual survey of the route filed with the county commissioners of the counties through which the same shall pass on or before the first day of January, in the year of our Lord one thousand eight hundred and sixty-five, or if the said corporation shall fail to complete said railroad to Anson on or before the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine, in either of the above mentioned cases this act shall be null and void.

REVISED STATUTES, CHAPTER 51.—1871.

SECT. 47. When a railroad corporation mortgages its franchise for the payment of its bonds or coupons, and trustees are appointed by it, or by special laws, or by the mortgage, the bondholders at a regular meeting called for that purpose and notified as hereinafter provided, may, from time to time, elect, by ballot, new trustees to fill vacancies, or take the place of others holding the trust; but no trustee shall be thus removed until he is paid for all that is due him, and secured against all liabilities assumed by him as said trustee. Any party interested may present the proceedings of such meeting to the Supreme Judicial Court, or to a justice thereof in vacation, who shall appoint a time of hearing, and order such notice to parties interested as he deems proper, and may affirm such elections, and make and enforce any decrees necessary for the transfer of the trust property to the new trustees. All such decrees shall be filed with the clerk of the court where the hearing is had, and recorded by him.

SECT. 48. The neglect of the corporation to pay any overdue bonds or coupons secured by such mortgage, for ninety days after presentment and demand on the treasurer or president thereof, shall be a breach of the conditions of the mortgage; and thereupon the trustees shall call a meeting of the bondholders, by publishing the time and place thereof three weeks successively in the state paper, and in some paper in the county where the road lies, the last publication to be one week at least before the time of the meeting.

SECT. 49. At such meeting and all others, each bondholder present may have one vote for each hundred dollars of bonds held by him or represented by proxy; and they may organize by the choice of a moderator and clerk, and determine whether the trustees shall take possession of such road, and manage and run it in their behalf.

SECT. 50. If they so determine, the trustees shall take possession of such road and all other property covered by the mortgage, and have all the rights and powers, and be subject to all the obligations of the directors and corporation of such road, and may also prosecute and defend suits in their own name as trustees.

SECT. 51. They shall keep an accurate account of all receipts, and expenditures of such road and exhibit it, on request, to any officer of the corporation, or other person interested. They shall from the receipts keep the road, buildings and equipments in repair; furnish such new rolling stock as is necessary, and the balance, after paying the running expenses, shall be applied according to the rights of parties under the mortgage, and to the payment of any damages arising from malfeasance in the management of the road. They shall not be personally liable except for malfeasance or fraud. When all overdue bonds and coupons, secured by the mortgage are paid, they shall surrender the road and other property to the parties entitled thereto.

SECT. 52. They shall annually, and at other times on written request of one-fifth of the bondholders in amount, call a meeting of the bondholders in the manner prescribed in the by-laws of the corporation for calling a meeting of stockholders, and report to them the state of the property, the receipts, expenses and application of the funds. At such meeting, the bondholders may fix the compensation of the trustees; instruct them to contract with the directors of the corporation or other competent party, to operate said road while the trustees have the right of possession, if approved by the bondholders at a regular meeting, otherwise not exceeding two years, and to pay to them the net earnings thereof; or give them any other instruction they deem advisable; and the trustees shall conform thereto, unless inconsistent with the terms of the trust.

SECT. 53. The trustees on application of one-third of the bondholders in amount to have such mortgage foreclosed, shall immediately give notice thereof, by publishing it three weeks successively in the state paper and some paper, if any, in each county in which the road extends, therein stating the date and conditions of the

mortgage, the claims of the applicants under it, that the conditions thereof have been broken, and that for that reason they claim a foreclosure; and they shall cause a copy of such notice and the name and date of each newspaper containing it, to be recorded in the registry of deeds in each such county, within sixty days from the first publication; and unless, within three years from the first publication, the mortgage is redeemed by the mortgagors or those claimant under them, or a bill in equity as in cases of the redemption of mortgaged lands is commenced, founded on payment or a legal tender of the amount of overdue bonds and coupons, or containing an averment that the complainants are ready and willing to redeem on the rendering of an account, the right of redemption shall be forever foreclosed.

SECT. 54. Each holder of overdue bonds or coupons shall present them to the trustees at least thirty days before the right of redemption expires, to be by them recorded; and such right shall not be lost by the non-payment of any claims not so presented; and the parties having the right to redeem shall have free access to the record of such claims.

SECT. 55. The foreclosure of the mortgage shall enure to the benefit of all holders of bonds, coupons and other claims secured thereby; and they, their successors and assigns are constituted a corporation as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter; and the trustees shall convey to such new corporation by deeds all the right, title and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged. If they neglect or refuse so to convey, the court, on application in equity, may compel them so to do.

SECT. 56. The new corporation may call its first meeting in the manner provided for calling the first meeting of the original corporation and use therefor the old name; but at that meeting, may adopt a new one, by which it shall always after be known; and it may take and hold the possession, and have the use of the mortgaged property, though a bill in equity to redeem is pending, and may become a party defendant to such bill.

SECT. 57. If any part of such property or franchise is subject to a prior mortgage, such new corporation, at a legal meeting called for that purpose, may vote to redeem the same, and make an assessment therefor on all persons holding any stock, certificates for fractions of stock, bonds or coupons in such corporation in proportion to their accounts. The directors shall immediately assess such sum, and fix a time and place for the payment thereof to the treasurer, who shall publish notice accordingly six weeks successively in some newspaper, if any, in each of the counties where the road extends, the last publication to be two weeks at least before the time fixed for payment.

SECT. 58. If any person fails to pay his assessment within the time fixed, the treasurer shall sell enough of his stock at auction to pay the same, with twelve per cent. interest and the cost of adver-

tising and selling, by first publishing notice of such sale three weeks successively in a newspaper printed in the county where the sale is to be, if any, and if not in an adjoining county. Thereupon the president and treasurer shall issue a new certificate of stock to the purchaser; and the delinquent stockholder shall surrender his to be cancelled, and may have a new one for his unsold shares by paying the legal stamp; and if he held bonds, coupons or certificates for fractions of stock, he shall not be entitled to commute them or receive any dividends thereon until he has paid his assessment with twelve per cent. interest.

SECT. 59. The directors shall apply the money realized from such assessments solely to the redemption of such prior mortgage until it is fully paid; and then all the property, rights and interests secured thereby shall vest in such new corporation.

SECT. 60. When a subsequent mortgage of a railroad, its franchise or of any part of its other property, contains no provision for a sale, or a conditional provision depending on the application of a majority in amount of the claims secured thereby, and no such application has been made to the trustees, the holder of such mortgage may redeem a prior mortgage on the same property which is under process of foreclosure, at any time before it comes absolute; and hold it in trust for those who contributed thereto in proportion to the amount paid by each.

SECT. 61. For such purpose, the trustees of such subsequent mortgage, on the application of one or more persons interested therein, made six months prior to the absolute foreclosure of such prior mortgage, and on payment of reasonable expenses to be incurred thereby, shall call a meeting of all interested and publish a notice thereof, stating the time, place and purpose, three weeks successively in the state paper and such other papers as they may think proper. If at such meeting, or one called by the trustees without application, the holders of a majority of the interests there represented vote to redeem the prior mortgage, each one may contribute his proportion thereto. The trustees shall give immediate notice of such vote by publishing it as above, and shall therein state the time and place of payment, and the amount to be paid on each hundred dollars as near as may be. If anyone fails to pay his proportion, any other person interested in said subsequent mortgage may pay it, and succeed to all his rights except as hereinafter provided.

SECT. 62. If no such meeting is called or it is voted not to redeem, one or more of the persons interested in such subsequent mortgage, may pay to the trustees thereof the amount required to redeem the prior mortgage; and such trustees shall redeem it accordingly and then hold in trust for the persons so paying.

SECT. 63. When a prior mortgage has been redeemed in either mode aforesaid, and all persons interested in the subsequent mortgage have not paid their proportions thereof, the trustees shall publish a notice ten weeks successively in the state paper, the first pub-

lication not to be till the right of redeeming the prior mortgage would have expired, that delinquents may pay the same to them or their agents with twelve per cent. interest within one year from the first publication of said notice ; and any person so paying shall have the same rights as if he had paid originally ; and those not so paying are barred. Money so paid shall be divided ratably to those who advanced the redemption money ; and they may become a new corporation, and new certificates of stock or fractions of stock may be issued in the manner and with the rights, powers and obligations hereinbefore provided.

SECT. 64. When a prior mortgage is thus redeemed, any number of the stockholders of the old corporation may redeem it within two years thereafter by paying to the trustees of such subsequent mortgage the amount paid therefor, with ten per cent. interest, and also the amount secured by the subsequent mortgage due to those who had contributed to redeem the prior mortgage, after deducting the net earnings of said road or adding the net deficiencies, if operated by the trustees of the subsequent mortgage ; and said stockholders may demand of said trustees an accurate account of the receipts and expenditures and amount due, on the mortgage, and have the same remedies for a failure as in case of mortgages of real estate. After such redemption the redeeming stockholders shall have all the rights of those from whom they redeemed.

SECT. 65. The stockholders redeeming as aforesaid, shall give notice to the stockholders who have not contributed thereto ; and the latter shall have the same rights hereinbefore provided in the case of bondholders.

SECT. 66. The persons interested in a prior mortgage on which a foreclosure is commenced, at a meeting called for the purpose, may extend the time of redemption ; and thereupon the trustees of such mortgage, by a suitable writing, delivered to the party entitled to redeem, shall extend the time accordingly.

SECT. 67. When the franchise of a railroad and its road, wholly or partly constructed, are sold by a decree of the Court, by a power of sale in a mortgage thereof or on execution, the purchasers have all the rights, powers and obligations of the corporation under its charter, and may form a new corporation in the manner hereinbefore provided. If the original corporation or those claiming under it have a right to redeem, they may do so in the manner provided for the redemption of mortgaged real estate ; but shall pay in addition to the amount of the sale and interest, the reasonable expenditures made by the new corporation in completing, repairing and equipping said road, and in the purchase of necessary property therefor, after deducting the net earnings thereof.

SECT. 68. The trustees of the bondholders or other parties under contract with them operating a railroad, and all the corporations formed in the modes hereinbefore provided, shall have the

same rights, powers and obligations as the old corporation had by its charter and the general laws; and shall also be subject to be amended, altered or repealed by the legislature and to all the general laws concerning railroads, notwithstanding anything to the contrary in the original charter.

SECT. 69. The original corporation shall exist, after the foreclosure of the mortgage, for the sole purpose of closing up its unsettled business; and the right of action against it or its stockholders shall not thereby be impaired; but in suits founded on any of the bonds or coupons secured by the mortgage, the proportional actual value of the property taken under the mortgage shall be deducted.

SECT. 70. The Supreme Judicial Court, in addition to the jurisdiction specifically conferred upon it by this chapter, may have jurisdiction, as in equity, of all other matters in dispute arising under the preceding sections relating to trustees, mortgages, and the redemption and foreclosure of mortgages; but not to take away any rights or remedies that any party has and may elect to enforce at law; and in all proceedings relating to trustees or to mortgages, their foreclosure and redemption, not otherwise provided for herein, the law relating to trusts and mortgages of real estate may be applied.

CHAPTER 90.—1871.

SECT. 1. Mortgages of real estate, mentioned in this chapter, include those made in the usual form, in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time or as part of the same transaction.

SECT. 2. Any mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof before a breach of the condition of the mortgage, when there is no agreement to the contrary; but in such case, if the debt is afterwards paid or the mortgage redeemed the amount of the clear rents and profits, from the time of the entry, shall be accounted for, and deducted from the amount due on the mortgage.

SECT. 3. After breach of the condition, if the mortgagee, or any one claiming under him, desires to obtain possession of the premises for the purpose of foreclosure, he may proceed in either of the following ways, viz:

First. He may commence an action at law and obtain possession under a writ of possession issued on the judgment in the action, as provided in the eighth section duly executed by an officer. An

abstract of such writ, stating the time of obtaining possession, certified by the clerk, shall be recorded in the registry of deeds of the district in which the estate is, within thirty days after possession obtained.

Second. He may enter possession, and hold the same by consent in writing of the mortgagor, or the person holding under him.

Third. He may enter peaceably and openly, if not opposed, in the presence of two witnesses and take possession of the premises; and a certificate of the fact and time of such entry shall be made, signed and sworn to by such witnesses before a justice of the peace; and such written consent and certificate shall be recorded in each registry of deeds in which the mortgage is or by law ought to be recorded, within thirty days next after the entry is made.

SECT. 4. Possession obtained in either of these three modes, and continued for the three following years, shall forever foreclose right of redemption.

SECT. 5. If after breach of the condition, the mortgagee, or any person claiming under him, is not desirous of taking and holding possession of the premises, he may proceed for the purpose of foreclosure in either of the following modes:

First. He may give public notice in a newspaper printed in the county where the premises are situated, if any, or if not, in the state paper, three weeks successively, of his claim by mortgage on such real estate, describing the premises intelligibly, and naming the date of the mortgage, and that the condition in it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry of deeds in which the mortgage deed is or by law ought to be recorded, within thirty days after such last publication.

Second. He may cause an attested copy of such notice to be served on the mortgagor or his assignee, if he lives in this state, by the sheriff or his deputy of the same county, by delivering it to him in hand or leaving it at his place of last and usual abode; and cause the original notice and the sheriff's return thereon to be recorded within thirty days after such service as aforesaid; and in all cases the certificate of the register of deeds shall be *prima facie* evidence of the fact of such entry, notice, publication of foreclosure, and of the sheriff's return.

SECT. 6. The mortgagor, or person claiming under him, may redeem the mortgaged premises within three years next after the first publication, or the service of the notice mentioned in the preceding section, and if not so redeemed his right of redemption shall be forever foreclosed.

SECT. 7. The mortgagee, or person claiming under him, in an action for possession, may declare on his own seizin, in a writ of

entry, without naming the mortgage or assignment; and if it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to the possession of the premises for the breach of the condition of the mortgage, the court shall, on the motion of either party, award the conditional judgment hereinafter mentioned, unless it appears that the tenant is not the mortgager, or a person claiming under him, and in that case, judgment may be entered as at common law, unless the plaintiff consents to the entry of a conditional judgment.

SECT. 8. The conditional judgment shall be that, if the mortgager, his heirs, executor or administrator, pay the sum the court adjudges to be due and payable, with interest, within two months from the time of judgment, and shall also pay such other sums as the court adjudges to be thereafter payable, within two months from the time they fall due, no writ of possession shall issue and the mortgage shall be void; otherwise it shall issue in due form of law, upon the first failure to pay according to said judgment. When the condition is for doing some other act than the payment of money, the court may vary the conditional judgment as the circumstances require; and the writ of possession shall issue, if the terms of the conditional judgment are not complied with within the two months.

SECT. 9. If it appears that nothing is due on the mortgage, judgment shall be rendered for the defendant and for his costs, and he shall hold the land discharged of the mortgage.

SECT. 10. When a mortgagee, or person claiming under him, is dead, the same proceedings to foreclose the mortgage may be had by his executor or administrator, declaring on the seizin of the deceased, as he might have had if living.

SECT. 11. Lands mortgaged to secure the payment of debts, or the performance of any collateral engagement, and the debts so secured, on the decease of the mortgagee, or person claiming under him, shall be assets in the hands of his executors or administrators; and they shall have the control of them as of a personal pledge; and when they recover seizin and possession thereof, it shall be to the use of the widow and heirs, or devisees, or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises.

SECT. 12. An action on a mortgage deed may be brought against a person in possession of the mortgaged premises; and the mortgager, or person claiming under him, may, in all cases, be joined with him as a cotenant, whether he then has any interest or not in the premises; but he shall not be liable for costs, when he has no such interest, and makes his disclaimer thereto upon the records of the court.

SECT. 13. Any mortgager, or other person having a right to redeem lands mortgaged, may demand of the mortgagee or person claiming under him a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and if he unreasonably refuses or neglects to render such account in writing, or, in any other way by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited in section six, and therein offer to pay the sum found to be equitably due, or to perform any other condition, as the case may require; and such offer shall have the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender, and thereupon he shall be entitled to judgment for redemption and costs.

CHAPTER 104.—1871.

SECT. 1. Any estate of freehold, in fee simple, fee tail, for life, or any term of years, may be recovered by a writ of entry; and such writs, and the writ in action of dower, shall be served by attachment and summons, or copy of the writ, on the defendant, but if he is not in possession, the officer shall give the tenant in hand, or leave at his place of last and usual abode, an attested copy of the writ; and if the defendant is not an inhabitant of this state, the service on the tenant shall be sufficient notice to the defendant, or the court may order further notice.

SECT. 2. The defendant shall declare on his own seizin within twenty years then last past, without naming any particular day, or averring a taking of the profits, and allege a disseizin by the tenant.

SECT. 3. He shall set forth the estate he claims in the premises, whether in fee simple, fee tail, for life or for years; and if for life, then whether for his own life or that of another; but need not state in the writ the origin of his title, or the deduction of it to himself; but, on application of the tenant, the court may direct the demandant to file an informal statement of his title, and its origin.

SECT. 4. He need not prove an actual entry under his title; but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, shall be sufficient proof of his seizin.

SECT. 5. No such action shall be maintained, unless, at the time of commencing it, the defendant had such right of entry; and no descent or discontinuance shall defeat any right of entry for the recovery of real estate.

SECT. 6. Every person alleged to be in possession of the premises demanded in such writ, claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not tenant of the freehold or by a brief statement under the general issue, filed within the time allowed for pleas in abatement, unless by leave of court the time therefor is enlarged; and he may show that he was not in possession of the premises when the action was commenced, and disclaim any right, title or interest therein, and proof of such fact shall defeat the action; and if he claimed, or was in possession of only a part of the premises when the action was commenced, he shall describe such part in a statement, signed by him or his attorney and filed in the case, and may disclaim the residue; and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part.

SECT. 7. If the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election be considered a disseizor for the purpose of trying the right, though he claims an estate therein less than a freehold.

SECT. 8. In the trial upon such writ, on the general issue, if the demandant proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better title in himself.

SECT. 9. Persons claiming as tenants in common, joint tenants, or co-partners, may all, or any two or more, join in a suit for recovery of lands; or one may sue alone.

SECT. 10. The demandant may recover a specific part or undivided portion of the premises to which he proves a title, though less than he demanded.

SECT. 11. When a demandant recovers judgment in a writ of entry he may therein recover damages for the rents and profits of the premises from the time his title accrued, subject to the limitation herein contained; and for any destruction or waste of the buildings or other property, for which the tenant is by law answerable.

SECT. 12. The rents and profits, for which the tenant is liable, is the clear annual value of the premises while he was in possession, after deducting all lawful taxes paid by him, and the necessary and ordinary expenses of repairs, cultivating the land, or collecting the rents and profits.

SECT. 13. In estimating the rents and profits, the value of the use by the tenant of improvements made by himself, or those under whom he claims, shall not be allowed to the demandant.

SECT. 14. The tenant shall not be liable for the rents and profits for more than six years, nor for waste or other damage committed before that time, unless the rents and profits are allowed in set-off to his claim for improvements.

CHAPTER 622.

AN ACT authorizing certain towns to raise money to aid in the construction of the Somerset Railroad, or Somerset and Kennebec Railroad.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SECT. 1. The towns of Anson, Bingham, Embden, New Portland, Norridgewock, Solon and Starks, may severally, at any legal meeting duly notified and held for that purpose, raise by tax or loan such sums of money as they shall severally deem expedient, not exceeding one hundred thousand dollars by the town of Anson, forty thousand dollars by the town of Bingham, forty thousand dollars by the town of Embden, sixty thousand dollars by the town of New Portland, eighty thousand dollars by the town of Norridgewock, sixty thousand dollars by the town of Solon, and forty thousand dollars by the town of Starks, and may appropriate the same to aid in the construction of the Somerset Railroad, or extending the Somerset and Kennebec Railroad, in such manner as they shall deem proper; provided that two-thirds of the legal voters present and voting at such meetings shall vote therefor.

SECT. 2. The towns named in the first section of this act may severally make such contracts with the Somerset Railroad Company for the purpose mentioned in the preceding section as they may think necessary, and may raise money by tax or loan to carry the same into effect, not exceeding the amount stated in the preceding section.

SECT. 3. The said towns shall severally raise in each year commencing the third year after a loan shall be effected, should the money be raised by a loan, a sum not less than three per cent. of the amount of such loan, to be applied to the liquidation of the principal of such loan in addition to the interest, unless the same shall be satisfactorily provided for in some other way.

SECT. 4. The selectmen of the several towns named in this act are authorized to vote upon the stock held by said towns at all meetings of said railroad corporation, or appoint an agent for that purpose, by writing, under their hands.

SECT. 5. This act shall take effect when approved.

Approved March 6, 1868.

CHAPTER 53.—1878.

AN ACT in addition to chapter fifty-one of the Revised Statutes, relating to mortgages of corporations.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows :

SECT. 1. The provisions of sections forty-seven to seventy, each inclusive, of chapter fifty-one of the Revised Statutes, and all acts explanatory or amendatory thereof or additional thereto, shall apply to and include all mortgages of franchises, lands, property and rights of property of any kind whatever, whether heretofore given or hereafter to be given by any corporation to trustees, to secure the payment of scrip or bonds of said corporation, in all cases in which the principal of said scrip or bonds shall have been due and payable for more than three years, and shall remain unpaid in whole or in part, in the same way and to the same extent as if the mortgage had been legally foreclosed, subject to all rights of redemption, as provided in section fifty-seven of said chapter fifty-one ; and the holders of said scrip or bonds shall have the benefit of all said provisions and acts, and shall have all the rights and powers of the corporation under its charter, and may form a new corporation in the manner provided in said chapter fifty-one and the acts amendatory thereof and additional thereto, whenever the holders of such scrip or bonds to any amount exceeding one-half of the same shall so elect, in writing.

SECT. 2. The capital stock of such new corporation shall be equal to the amount of unpaid bonds and coupons secured by such mortgage, taken at their face at the time of the organization of the new corporation, and the amount required to redeem any prior mortgage, and shall be divided into shares of one hundred dollars each. All stock issued under the provisions of this act shall be taken and considered as paid for in full, and shall not be liable to further assessment ; and no person, taking or holding the same, shall by reason thereof be liable for the debts of such corporation.

Approved February 19, 1878.

CHAPTER 90.—1883.— R. S.

SEC. 1. Mortgages of real estate, mentioned in this chapter, include those made in the usual form, in which the condition is set forth in deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time or as part of the same transaction.

SEC. 2. A mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof, before or after breach of condition, when there is no agreement to the contrary; but in such case, if the mortgage is afterwards redeemed, the amount of the clear rents and profits from time of taking possession, shall be accounted for and deducted from the sum due on the mortgage.

SEC. 3. After breach of the condition, if the mortgagee, or any one claiming under him, desires to obtain possession of the premises for the purpose of foreclosure, he may proceed in either of the following ways, viz:

I. He may obtain possession under a writ of possession issued on a conditional judgment, as provided in section nine, duly executed by an officer. An abstract of such writ, stating the time of obtaining possession, certified by the clerk, shall be recorded in the registry of deeds of the district in which the estate is, within thirty days after possession has been obtained.

II. He may enter into possession and hold the same by consent in writing of the mortgagor, or the person holding under him.

III. He may enter peaceably and openly, if not opposed, in the presence of two witnesses, and take possession of the premises; and a certificate of the fact and time of such entry shall be made, signed and sworn to by such witnesses before a justice of the peace; and such certificate, or consent, with the affidavit of the mortgagee or his assignee to the fact and time of entry indorsed thereon, shall be recorded in each registry of deeds in which the mortgage is or by law ought to be recorded, within thirty days after the entry is made.

SEC. 4. Possession obtained in either of these three modes, and continued for the three following years, forever forecloses the right of redemption.

SEC. 5. If after breach of the condition, the mortgagee, or any person claiming under him, is not desirous of taking and holding possession of the premises, he may proceed for the purpose of foreclosure in either of the following modes:

I. He may give public notice in a newspaper printed in the county where the premises are situated, if any, or if not, in the

state paper, three weeks successively, of his claim by mortgage on such real estate, describing the premises intelligibly, and naming the date of the mortgage, and that the condition in it is broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry in which the mortgage deed is or by law ought to be recorded, within thirty days after such last publication.

II. He may cause an attested copy of such notice to be served on the mortgagor or his assignee, if he lives in the state, by the sheriff of the same county or his deputy, by delivering it to him in hand or leaving it at his place of last and usual abode; and cause the original notice and the sheriff's return thereon to be recorded within thirty days after such service as aforesaid; and in all cases the certificate of the register of deeds if *prima facie* evidence of the fact of such entry, notice, publication of foreclosure, and of the sheriff's return.

SEC. 6. The mortgagor, or person claiming under him, may redeem the mortgaged premises within three years after the first publication, or the service of the notice mentioned in the preceding section, and if not so redeemed his right of redemption is forever foreclosed; provided, that the mortgagor and mortgagee may agree upon a shorter time, not less than one year, in which the mortgage shall be forever foreclosed, which agreement shall be inserted in the mortgage and be binding on the parties, their heirs and assigns, and shall apply to all the modes prescribed for the foreclosure of mortgages on real estate.

SEC. 7. Whenever a mortgagee or his assignee dies, and there is no executor or administrator to receive the mortgage money, the mortgagor or person claiming under him having a right to redeem, may apply to the judge of probate of the county where the estate mortgaged is situated, for the appointment of an administrator upon such estate, and if, after due notice to all parties interested therein, they neglect or refuse to take out administration for thirty days, then the judge may commit administration to such person as he deems suitable, who may act as administrator with reference to said mortgage, as provided by law.

In all such cases, however, personal notice shall first be given to the widow and heirs of the deceased known to be living in the state, either by service on them in person or by leaving such notice at their last and usual place of abode.

SEC. 8. The mortgagee, or person claiming under him, in an action for possession, may declare on his own seizin, in a writ of entry without naming the mortgage or assignment; and if it appears on default, demurrer, verdict or otherwise, that the plaintiff is entitled to possession, and that the condition had been broken when the action was commenced, the court shall, on motion of

either party, award the conditional judgment, unless it appear, that the tenant is not the mortgagor or a person claiming under him, or that the owner of the mortgage proceeded for foreclosure conformably to sections five and six before the suit was commenced, the plaintiff not consenting to such judgment, and unless such judgment is awarded, judgment shall be entered as at common law.

SEC. 9. The conditional judgment shall be, that if the mortgagor, his heirs, executor or administrator, pay the sum that the court adjudges to be due and payable, with interest, within two months from the time of judgment, and also pays such other sums as the court adjudges to be thereafter payable, within two months from the time that they fall due, no writ of possession shall issue and the mortgage shall be void; otherwise it shall issue in due form of law, upon the first failure to pay according to said judgment. And if, after three years from the rendition of the judgment, the writ of possession has not been served or the judgment wholly satisfied, another conditional judgment may, on *scire facias* sued out in the name of the mortgagee or assignee, be rendered, and a writ of possession issued as before provided. When the condition is for doing some other act than the payment of money, the court may vary the conditional judgment as the circumstances require; and the writ of possession shall issue, if the terms of the conditional judgment are not complied with within the two months.

SEC. 10. If it appears that nothing is due on the mortgage, judgment shall be rendered for the defendant and for his costs, and he shall hold the land discharged of the mortgage.

SEC. 11. When a mortgagee, or person claiming under him, is dead, the same proceedings to foreclose the mortgage may be had by his executor or administrator, declaring on the seizin of the deceased, as he might have had if living.

SEC. 12. Lands mortgaged to secure the payment of debts, or the performance of any collateral engagement, and the debts so secured, are on the death of the mortgagee, or person claiming under him, assets in the hands of his executors or administrators; they shall have the control of them as of a personal pledge; and when they recover seizin and possession thereof, it shall be for the widow and heirs, or devisees, or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises.

SEC. 13. An action on a mortgage deed may be brought against a person in possession of the mortgaged premises; and the mortgagor, or person claiming under him, may, in all cases, be joined with him as a co-tenant, whether he then has any interest or not in the premises; but he is not liable for costs, when he has no such interest, and makes his disclaimer thereto upon the records of the Court.

SEC. 14. Any mortgagor, or other person having a right to redeem lands mortgaged, may demand of the mortgagee or person claiming under him a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and if he unreasonably refuses or neglects to render such statement in writing, or, in any other way, by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited in section six, and therein offer to pay the sum found to be equitably due, or to perform any other condition as the case may require; and such offer has the same force as a tender payment or performance before the commencement of the suit; and the bill shall be sustained without such tender, and thereupon he shall be entitled to judgment for redemption and costs.

CHAPTER 104.—R. S.—1883.

SEC. 1. Any estate of freehold, in fee simple, fee tail, for life, or any term of years, may be recovered by a writ of entry; and such writs, and the writ in an action of dower, shall be served by attachment and summons, or copy of the writ, on the defendant, but if he is not in possession, the officer shall give the tenant in hand, or leave at his place of last and usual abode, an attested copy of the writ; and if the defendant is not an inhabitant of the state, the service on the tenant shall be sufficient notice to the defendant, or the court may order further notice.

SEC. 2. The demandant shall declare on his own seizin within twenty years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the tenant.

SEC. 3. He shall set forth the estate which he claims in the premises, whether in fee simple, fee tail, for life or for years; and if for life, then whether for his own life, or that of another; but he need not state in the writ the origin of his title, or the deduction of it to himself; but, on application, of the tenant, the court may direct the demandant to file an informal statement of his title, and its origin.

SEC. 4. He need not prove an actual entry under his title; but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, is sufficient proof of his seizin.

SEC. 5. No such action shall be maintained, unless, at the time of commencing it, the demandant had such right of entry; and no

descent or discontinuance shall defeat any right of entry for the recovery of real estate.

SEC. 6. Every person alleged to be in possession of the premises demanded in such writ claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not tenant of the freehold or he may plead it by a brief statement under the general issue, filed within the time allowed for pleas in abatement, unless by leave of court the time therefor is enlarged; and he may show that he is not in possession of the premises when the action was commenced, and disclaim any right, title, or interest therein, and proof of such fact shall defeat the action; and if he claimed or was in possession of only a part of the premises when the action was commenced, he shall describe such part in a statement, signed by him or his attorney and filed in the case, and may disclaim the residue; and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part.

SEC. 7. If the person in possession has actually ousted the demandant or withheld the possession, he may at the demandant's election, be considered a disseizor for the purpose of trying the right, although he claims an estate therein less than a freehold.

SEC. 8. In the trial upon such writ, on the general issue, if the demandant proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better title in himself.

SEC. 9. Persons claiming as tenants in common, joint tenants, or co-partners, may all, or any two or more, join in a suit for recovery of lands, or one may sue alone.

SEC. 10. The demandant may recover a specific part or undivided portion of the premises to which he proves a title, although less than he demanded.

SEC. 11. When a demandant recovers judgment in a writ of entry, he may therein recover damages for the rents and profits of the premises, for the time when his title accrued, subject to the limitation herein contained; and for any destruction or waste of the buildings or other property, for which the tenant is by law answerable.

SEC. 12. The rents and profits, for which the tenant is liable, are the clear annual value of the premises while he was in possession, after deducting all lawful taxes paid by him, and the necessary and ordinary expenses of repairs, cultivation of the land, or collection of the rents and profits.

SEC. 13. In estimating the rents and profits, the value of the

use by the tenant of improvements made by himself or by those under whom he claims, shall not be allowed to the demandant.

SEC. 14. The tenant is not liable for the rents and profits for more than six years, nor for waste or other damage committed before that time, unless the rents and profits are allowed in set-off to his claim for improvements.

CHAPTER 103—1887.

AN ACT to amend section one hundred and nine of chapter fifty-one of the Revised Statutes, relating to railroads.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows :

SECT. L. Section one hundred and nine of chapter fifty-one of the revised statutes, is hereby amended by adding thereto the following : "And any subsequent foreclosure, in any method provided by law, of the mortgage given to secure such bonds or scrip, shall insure at once for the benefit of such corporation, and vest therein the title acquired by such foreclosure," so that said section as amended, shall read as follows :

SECT. 109. Sections eighty-five to one hundred and eight, each inclusive, apply to and include all mortgages of franchises, lands, property hereditaments and rights of property of every kind whatever, whether heretofore given or hereafter to be given by any corporation to trustees, to secure the payment of scrip or bonds of said corporation, in all cases in which the principal of said scrip or bonds has been due and payable for more than three years, and remains unpaid in whole or in part, or on which no interest has been paid for more than three years, in the same way and to the same extent as if the mortgage has been legally foreclosed, subject to all rights of redemption, as provided in section ninety-five ; and the holders of said scrip or bonds shall have the benefit of said sections, and all the rights and powers of the corporation under its charter, and may form a new corporation in the manner provided in this chapter, whenever the holders of such scrip or bonds to an amount exceeding one-half of the same so elect, in writing. And any subsequent foreclosure, in any method provided by law, of the mortgage given to secure such bonds or scrip, shall inure at once for the benefit of such corporation, and vest therein the title acquired by such foreclosure.

SECT. 2. This act shall take effect when approved.

Approved March 11, 1887.

CHAPTER 166.

AN ACT amendatory of and additional to chapter fifty-one of the Revised Statutes, in relation to railroads.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows :

SEC. 1. Section sixty-seven of chapter fifty-one of the revised statutes, is hereby amended by inserting after the word "road" in the first line thereof, the words, "or right of redeeming the franchise of a railroad, and its road from a mortgage thereof," so that the first clause of said section shall read as follows :

'SEC. 67. When the franchise of a railroad and its road, or the right of redeeming the franchise of a railroad and its road from a mortgage thereof, wholly or partly constructed, are sold by a decree of court, by a power of sale in a mortgage thereof, or on execution, the purchasers have all the rights, powers and obligations of the corporation, under its charter, and may form a new corporation in the manner hereinbefore provided.'

SEC. 2. Any corporation, formed under the provisions of chapter fifty-one of the revised statutes, and acts additional thereto, by the holders of railroad bonds, are empowered to acquire by purchase the right of redemption, under the mortgage securing such bonds.

SEC. 3. The provisions of chapter fifty-three of the laws of eighteen hundred and seventy-eight, shall apply to cases in which no interest has been paid for more than three years, as well as to cases in which the principal has been overdue for more than three years, as therein provided.

SEC. 4. Whenever the principal of any scrip or bonds issued by a railroad corporation shall have been due and payable for more than three years, or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds, may commence a suit in equity for the purpose of foreclosing such mortgage; and the court may decree a foreclosure of such mortgage, unless the arrears are paid within such time as the court may order.

SEC. 5. This act shall take effect when approved.

Approved March 6, 1883.



Ct. 12.

Motion to dismiss

Filed Oct. 14, 1898.

Motion to Dismiss for Lack of Jurisdiction.

Supreme Court of the United States.

No. ¹² 205. OCTOBER TERM, A. D., 1898.

LEWIS PIERCE, ET AL3.

THE SOMERSET RAILWAY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

Motion to Dismiss for Lack of Jurisdiction.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1896.

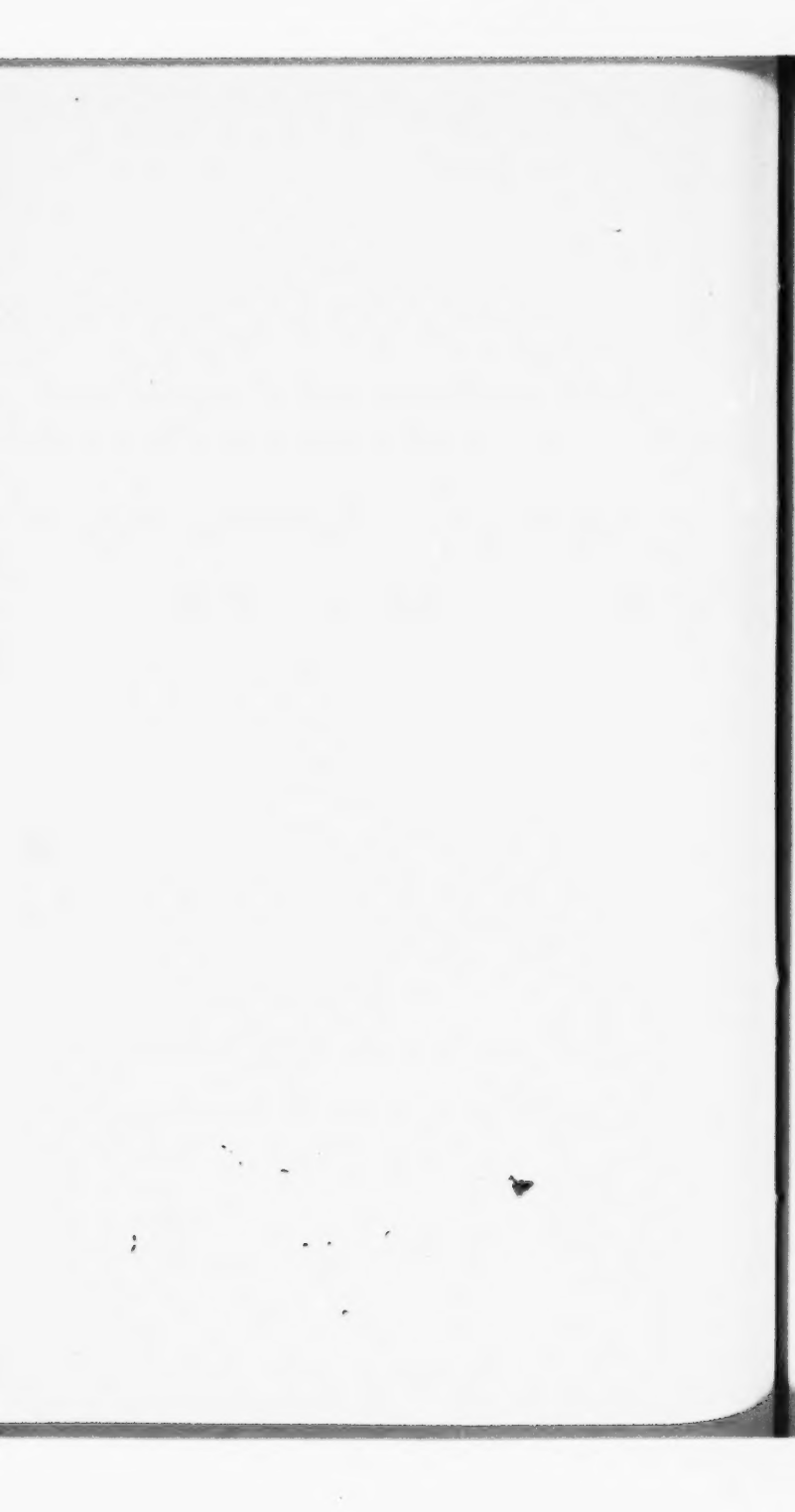
No. 185. OCTOBER TERM, A. D., 1897.

LEWIS PIERCE, ET ALs.

vs.

THE SOMERSET RAILWAY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.



Comes now the Somerset Railway, Defendant in error, in above entitled cause, by Josiah H. Drummond, Joseph W. Symonds, and E. F. Webb, its attorneys, and moves the Court to dismiss the writ of error in this case issued for the reason that this Court is without jurisdiction to interfere with the judgment rendered by the State Court for that:

(a) No federal question is presented by the record.

(b) It affirmatively appears from the record that no federal question was raised in, presented to or considered by, the State Court.

(c) It affirmatively appears from the record that no right of plaintiffs in error created or protected by the Constitution, statutes, or other laws of the United States, was involved in the controversy decided by the State Court.

(d) It affirmatively appears from the record that the decision and judgment complained of involved no more than a construction of a statute of the State of Maine; such decision construing the laws of the State of Maine in relation to the foreclosure of mortgages and organization of corporations in said State.

(e) The judgment and opinion complained of disclose, first, that no federal right or question was by the State Court considered or determined; and, second, that determination of any federal right or question was wholly unnecessary to sustain the judgment rendered.

Subject to the ruling on the foregoing motion, and in event of a holding that jurisdiction lies in this Court, the defendant in error, by its attorneys aforesaid, further moves the Court to affirm the judgment of the State Court for the reason that it is manifest from the record that said writ was sued out and is prosecuted for delay only, and that the question upon which the jurisdiction of this Court is invoked is so frivolous as to need no further argument than a mere statement of the facts established by the record.

EF Webb
J H Drummond
J W Symonds
Attorneys for Defendant in Error.

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N^o. 13.

Motion to Dismiss.

Filed Oct. 14, 1898.

Motion to Dismiss for Lack of Jurisdiction.

Office Supreme Court U. S.
FILED

OCT 14 1898

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1898.

No. ~~135~~ 13.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M.
DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN
ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE
W. GREELEY, FRANKLIN MERRILL, H. A. BURRILL AND
D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

Motion to Dismiss for Lack of Jurisdiction.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1896.

No. 185.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M.
DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN
ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE
W. GREELEY, FRANKLIN MERRILL, H. A. BURRILL AND
D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

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LEWIS PIERCE ET AL. VS. SOMERSET RAILWAY.

Come now John Ayer, William M. Ayer, A. R. Small, Horace W. Greeley, Franklin Merrill, H. A. Burrill and D. L. Foster, defendants in error in above entitled cause, by Josiah H. Drummond, Joseph W. Symonds and Edmund F. Webb, their attorneys, and move the Court to dismiss the writ of error in this case issued, for the reason that this Court is without jurisdiction to interfere with the judgment rendered by the State Court for that:

- (a) No federal question is presented by the record.
- (b) It affirmatively appears from the record that no federal question was raised in, presented to, or considered by, the State Court.
- (c) It affirmatively appears from the record that no right of plaintiffs in error created or protected by the Constitution, statutes, or other laws of the United States, was involved in the controversy decided by the State Court.
- (d) It affirmatively appears from the record that the decision and judgment complained of involved no more than a construction of a statute of the State of Maine, such decision construing the laws of the State of Maine, in relation to the foreclosure of mortgages and organization of corporations in said State.
- (e) The judgment and opinion complained of disclose, first, that no federal right or question was by the State Court considered or determined: and, second, that determination of any federal right or question was wholly unnecessary to sustain the judgment rendered.

Subject to the ruling upon the foregoing motion, and in event of a holding that jurisdiction lies in this Court, the defendants in error, by their attorneys aforesaid, further move the Court to affirm the judgment of the State Court, for the reason that it is manifest from the record that said writ was sued out, and is prosecuted for, delay only, and that the question upon which the jurisdiction of this Court is invoked is so frivolous as to need no further argument than a mere statement of the facts established by the record.

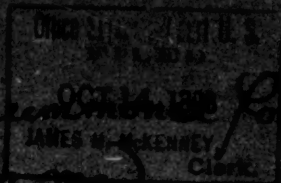
ET Webb
J H Drummond

Attorneys for Defendants in Error.

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Ct. 12

By *W. E. Webb & D. C. (as m.)*



Filed Oct. 14, 1898.

Brief of Defendant in Error in Support of Motion to Dismiss.

Supreme Court of the United States.

12
No. 195. OCTOBER TERM, A. D., 1898.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M.
DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN
ERROR,

vs.

THE SOMERSET RAILWAY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.



Brief of Defendant in Error in Support of Motion to Dismiss.

Supreme Court of the United States.

NO. 532. OCTOBER TERM, A. D., 1896.

No. 185. OCTOBER TERM, A. D., 1897.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M.
DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN
ERROR,

vs.

THE SOMERSET RAILWAY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

STATEMENT.

On the first day of July, A. D. 1871, a corporation was created by and under the laws of the State of Maine, known as the Somerset Railroad Company, authorized to build and maintain a railroad from West Waterville (now Oakland) northerly to Anson, Maine, and on the same day the said Somerset Railroad Company executed a mortgage of all its property to Lewis Pierce et als., Trustees, and to their successors, in joint tenancy; this mortgage embraced the railroad and franchise and all its real and personal property used in connection with the said railroad and all its property to be thereafter acquired. The mortgage was in trust for the benefit of the holders of the bonds of said Somerset Railroad Company issued to an amount not exceeding, in the whole, the sum of \$500,000.00, the same payable in twenty years from July 1, A. D. 1871, with interest at the rate of 7 per centum per annum, according to the coupons annexed to the said bonds; and said Somerset Railroad Company on said first of July, 1871, issued and sold its bonds secured by said mortgage to the amount of \$450,000, with proper coupons attached; the proceeds of the sale of said bonds were applied to the building and equipping of said railroad. And the said railroad was open to the public and commenced running in the year A. D. 1873.

On April 1st, A. D. 1883, and for a long time prior thereto said Somerset Railroad Company was insolvent and unable to meet its indebtedness as it matured, and its creditors threatened legal proceedings against it, and some creditors had instituted legal proceedings against it; this indebtedness, on July 13, A. D. 1883, was ascertained and determined by the stockholders of the corporation to be:

Floating debt over all assets	\$51,435.67
Interest on the same, estimated	36,000.00
Interest due on bonded debt	280,048.76
	<hr/>
	\$367,484.43
Bonds issued but not then due	450,000.00
	<hr/>
	\$817,484.43

The said sum of \$367,484.43 was due and payable on said 13th day of July, A. D. 1883. Said Company was hindered and delayed in the performance of its duties to an extent that rendered it practically impossible for it to do its current business. The said Pierce and

others, Trustees named in said mortgage, never took possession of said Somerset Railroad Company, and the same remained in the possession of said Somerset Railroad Company until the formation of the present new corporation entitled the Somerset Railway; said Trustees never took any measures to secure a foreclosure of said mortgage for breach of the condition thereof. On the 11th of July, A. D. 1883, there had been a breach of the condition of the mortgage and its bonds to the amount of \$450,000 were then outstanding and unpaid but not then due; but there had been a default in the payment of the interest coupons on said bonds, the same having been unpaid for more than three years.

On July 11, A. D. 1883, the holders of said bonds, to an amount exceeding one-half of the same, viz:—to the amount of \$351,900, elected to form a new corporation composed of the holders of said bonds, as provided by the statutes of the State of Maine; and on the 15th of August, A. D. 1883, said bondholders did form a new corporation under the name of the *Somerset Railway*. The corporation was organized in the manner provided by the laws of the State of Maine, and adopted a code of by-laws and elected officers. The capital stock of said new corporation, called the Somerset Railway, was \$736,648.76, made up as follows: \$450,000 outstanding bonds secured by the mortgage, as principal, and \$286,648.76 as interest on said bonds, due August 15, A. D. 1883, and then unpaid; and said capital stock was based on the foregoing figures as of August 15, A. D. 1883.

That thereupon said Somerset Railway took possession of the railroad franchise and all the property of said Somerset Railroad Company, and the stockholders of said Somerset Railroad Company voted to surrender possession of its railroad franchise and other property to said Somerset Railway, under its new organization as aforesaid. And by virtue of said votes and the authority of the laws of the State of Maine, said Somerset Railway, on September 1, A. D. 1883, took possession of the railroad and other mortgaged property embraced in the mortgage of July 1, A. D. 1871, and thereafter operated said railroad for the benefit of the Somerset Railway, and has continued so to operate said railway to this day. The amount of its capital stock is \$736,648.76 as herein stated and is equal to the amount of the unpaid bonds and overdue coupons secured by said mortgage of A. D. 1871, taken at their face value at the time of the organization of this corporation, to wit: August 15, A. D. 1883; and

the same has been divided into shares of \$100 each as required by law; and the officers of said Somerset Railway have issued to the holders of such bonds as have been surrendered to said Somerset Railway, under said reorganization, shares in the capital stock of said Somerset Railway in lieu of the bonds so surrendered, viz: one share of the capital stock of said Somerset Railway for each \$100 of said bonds or coupons due August 15, A. D. 1883; that \$339,400 of the \$450,000 bonds secured by said mortgage of A. D. 1871, have been so surrendered to said Somerset Railway and its capital stock issued in lieu thereof.

The amount of capital stock issued at the time that this suit was instituted in the Supreme Court of the State of Maine was \$552,200, and the amount of unconverted bonds at that time was \$110,600. The Somerset Railway has repeatedly offered, and still offers, to issue its capital stock aforesaid to all the holders of said bonds still outstanding, as provided by law.

In June, A. D. 1887, the directors of said Somerset Railway were authorized to issue bonds to the amount of \$225,000, payable in thirty years from July 1, A. D. 1887, with interest, and thereupon said Somerset Railway issued said bonds and secured the same by a mortgage of its railroad franchise and all its railroad property; and with the proceeds of the sale of said \$225,000 of bonds said directors of said Somerset Railway constructed and equipped an extension of its road, under its charter, from the village of North Anson to Bingham village, and said extension is now open to the public and is in full operation by said Somerset Railway and is a part of its railway line, its entire length of road from Oakland to Bingham being forty-two miles.

Said Somerset Railway has also contracted debts and made and issued promissory notes, and now has current liabilities amounting to about \$65,000; that it has made, and is still making, extensive improvements and repairs on its railroad.

In 1887, the mortgage given by said Somerset Railroad Company on July 1, A. D. 1871, was foreclosed by a decree of the Supreme Judicial Court of the State of Maine, as provided by law; the final decree therein being made on the 1st day of April, A. D. 1887; and that said judgment of foreclosure has never been reversed or annulled, but remains in full force; and said foreclosure, by the statutes of the State of Maine inures to the benefit of said Somerset Railway.

On the 8th day of July, A. D. 1884, the Somerset Railway claims to have become the sole owner of all the right in equity which said

Somerset Railroad Company, or any parties claiming under it, had of redeeming its mortgaged property from said mortgage of July 1, A. D. 1871, by sheriff's deed of that date, by virtue of sale on execution of said right of redemption; and that the time for redeeming said sale expired without any redemption therefrom, and said Somerset Railway claims to own said right of redemption.

On December 1, 1892, said Lewis Pierce et als., Trustees, under the mortgage of July 1, A. D. 1871, sued out of the Clerk's office in the Supreme Judicial Court in and for the County of Somerset, and also sued out of the Clerk's office of the Supreme Judicial Court in and for the County of Kennebec, a writ of entry (said railroad lying in said counties of Somerset and Kennebec, in the State of Maine,) in the names of said Pierce et als. as Trustees. Said writs of entry were brought against the President, Superintendent, Treasurer, Auditor, Conductors and Station Agents of the said Somerset Railway.

And said plaintiffs claimed in said writs to recover of said defendants, as individuals, the sum of \$180,000 as mesne profits.

Under said writs of entry, said plaintiffs claimed that said defendants were disseizors.

The alleged causes of action set out by said Pierce et als. in said respective suits at law pending in said counties of Somerset and Kennebec, arise and flow from said mortgage deed of July 1, A. D. 1871.

After said suits at law had been brought by said Pierce et als., Trustees, against the officers of said Somerset Railway, said Somerset Railway brought a suit in equity in the Supreme Court of the State of Maine. Said case is found in Maine Reports, Vol. 88, p. 86.

As this case and No. 185, Pierce et als. vs. Somerset Railway, are based upon practically the same facts and evidence, and are by agreement argued together [record p. 9] we respectfully ask permission to refer to our brief, in that case offered in support of the motion to dismiss.

ET Noble
J N Drummond
J W Lyman

Attorneys for Defendant in Error.



No. 13.

*Brief of Webb & Drummond
for D. C. (on mo.)*

Office Supreme Court U. S.
FILED

OCT 14 1898

MADEY H. MCKENNEY
CLERK.

Brief of Defendants in Error in Support of Motion to Dismiss.

Filed Oct. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1898

No. ~~132~~ 13.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M.
DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN
ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE
W. GREELY, FRANKLIN MERRILL, H. A. PURRILL AND
D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.



Brief of Defendants in Error in Support of Motion to Dismiss.

Supreme Court of the United States.

OCTOBER TERM. A. D., 1896.

No. 185.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M.
DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN
ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE
W. GREELY, FRANKLIN MERRILL, H. A. BURRILL AND
D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

This is a writ of entry brought under the laws of the State of Maine, to recover possession of a certain railroad called the **SOMERSET RAILROAD COMPANY**, lying within said State.

The defendants in error are the president, superintendent, treasurer, auditor and conductors of the Somerset Railway, now in possession of the so called Somerset Railroad Company.

The plaintiffs in error are the trustees named in a mortgage deed from the Somerset Railroad Company to said trustees, executed in A. D. 1870.

A further statement of the facts of this case and of the laws referred to seem unnecessary, because a fuller statement of facts and evidence is made in the case of these same plaintiffs in error against the Somerset Railway, said two cases being argued together, and we refer to the statement of facts in the latter case, as it is agreed on page 9 of the record.

The defendants in error claim that the plaintiffs' writ in error should be dismissed, because this Court has no jurisdiction. The record does not show that the plaintiffs in error specially set up or claimed in the State Court any right under the Constitution of the United States.

The pleadings of the plaintiffs in error, and of the defendants, as shown by the record, involve only a construction of the laws of the State of Maine. It does not appear that the attention even of the trial court was called to the fact that the plaintiffs in error, in any form or for any purpose, invoked the protection of the Constitution of the United States. Nor does it appear from the record that any Federal right was "specially" set up or claimed in the Supreme Court of the State of Maine, as required by Sect. 709, Rev. St. The case was not considered by the Supreme Court of the State of Maine with reference to any provision of the Constitution or any law of the United States.

"This Court has no authority to review the final judgment of the highest court of the State in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity, protected by the Constitution of the United States, unless the party against whom such judgment was rendered 'specially set up or claimed' such right under that instrument."

Chicago & North Western Railway Co. vs. Chicago,
164 U. S., 454.

A general statement that the decision of a State Court is against the constitutional rights of the objecting party, . . . or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question.

Clark vs. McDade, 165 U. S., 168.

"The jurisdiction of this Court to re-examine the final judgment of a State Court cannot arise from inference, but only from averment so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

"If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared."

Levey vs. Superior Court of San Francisco, 167 U. S., 175.

On error to a State Court in a chancery case (as also in a case at law), when the facts are found by the court below, this Court is concluded by such finding.

The opinion of the State Court is a part of the record, and it may be examined in order to ascertain the question presented.

Egan vs. Hart, 165 U. S., 188.

The record affirmatively shows that the only legal question at any time mooted was the construction of a State of Maine statute.

It just as clearly appears that no Federal question was either pleaded, raised or presented. (See assignment of errors, p. 226, and opinion of the Supreme Court of Maine.)

For these reasons it is respectfully submitted that the writ of error should be dismissed.

ET Nelson
J N Drummond

Attorneys for Defendants in Error.



N^{os} 12 & 13.

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Q. & A. of Webb & Drummond
for D. C.

MEMORANDA

Filed Oct. 12, 1898.
TO THE ARGUMENT

FOR

PLAINTIFFS IN ERROR.

So much has been said in relation to the invasion of the "rights of the minority bondholders" that a general statement in relation thereto will aid in understanding the merits of the questions raised.

Upon each of the condition of the mortgage, the rights of the bondholders were to have the mortgage foreclosed for their benefit; and, under the law existing when the mortgage was made, to become a corporation by virtue of the foreclosure.

This corporation was to own the property for the benefit of the bondholders, each of them having such proportion in the capital stock as the amount of his bonds should bear to the whole amount of the bonds issued.

This was the precise right of every bondholder; and all stood upon the same plane.

Allegations, that the acts under which the defendant in error claims, were not for the common benefit of all the bondholders, and to secure to every one his rights as just stated, are *simply not true*. All allegations that in all these proceedings there was any discrimination for or against any bondholder, or class of bondholders, or any attempt to so discriminate, are *contrary to the fact* and the evidence in this case shows that they are so.

The organization of the Somerset Railway, the purchase of the equity of redemption, the foreclosure of the mortgage, the extension of the railroad and the mortgaging of it to obtain the means to build it, were all *in the very nature of things* for the common

benefit of all the bondholders without any discrimination whatever.

Every vote of the bondholders and of the Somerset Railway shows this. After the foreclosure of the mortgage, every bondholder owned his exact share; he could exchange his bond for stock representing precisely what his bond had represented from the beginning and then represented, and on a perfect equality of right, in proportion to his interest, with all the rest. He could have done this at any time and he can do it now; in fact his bond now represents in the Somerset Railway precisely his share of the property and precisely the same share that any other bond of equal amount, by whomsoever held, ever has represented or now represents.

On p. 11, of the brief for the Plaintiffs in Error, a dissenting opinion of two of the Justices of the Supreme Court of Maine is referred to, and what purports to be such an opinion, is printed in that brief, pp. 50 *et seq.* There is no such opinion in the case made up by the Clerk: there is none in the volume of Maine Reports; and moreover, there is no note of any dissent. How the learned counsel can present the document to this court as a dissenting opinion in the State court, we cannot understand.

The case of *Stratton v. Railway*, 74 Maine, 422, is cited. But that was a case in which, after the necessary preliminary action by the bondholders, the Trustees had taken possession and were operating the railroad with the powers given to them in such a contingency, by the Statute. It has no application to the case at bar.

Considerable space is devoted by counsel to the foreclosure suit, and various complaints are made: but the mortgagor, the only party in interest was made respondent, and legal service made upon it: eminent counsel appeared generally for it and remained counsel for it to the end; it transpired that they were also counsel for the Town of Anson; they filed a demurrer; upon notice for a hearing on the demurrer, they proposed of their own motion to allow judgment to be entered for the complainants: the intimation that the opposition was withdrawn on account of a change in the Directors is an error; the parties were satisfied that the proceeding was for the benefit of all concerned (case, p.

213): counsel says that the demurrer "was overruled and without an answer or even taking the bill *pro confesso*" the decree was entered: he evidently has forgotten that at that time, judgment on a demurrer was final, except that for good cause shown the court might allow a replender. 59 Maine 605; 65 Maine 182.

So that, even if the regularity of the proceedings can be inquired into in this case, they are found to be regular, and the judgment a valid judgment as between the parties and their privies, fixing the *status* of the title to the mortgaged property. What the parties understood and expected would be the effect of this foreclosure is best stated in the Statute, then and ever since 1857 existing, (R. S. 1871 ch. 51, sec. 55):

"The foreclosure of the mortgage shall inure to the benefit of all the holders of bonds, coupons and other claims secured thereby; and they, their successors and assigns are constituted a corporation, as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter; and the trustees shall convey to such new corporation by deeds all the right, title and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged. If they neglect or refuse so to convey the court on application in equity may compel them so to do."

Let it be remembered, that when the act of March 11, 1887, was enacted, there had been no dissent of any bondholders to the organization of the Somerset Railway. On the other hand, the parties who had opposed the foreclosure, had accepted the proposed plan of organization, had ceased to press their own suits and were working in accord with the others, upon the assumption that *all the bondholders were members of the Somerset Railway* and that their interests and the interest of that company were precisely identical. Case, p. 213. At that time no question had been raised by any one that all the bondholders were not members of that Company.

We believe that it sufficiently appears in the evidence in this case, that this question was not raised until after the large majority of the bondholders had exchanged their bonds for stock.

And when the question *was* raised, and the position taken that all the proceedings were void, it was also held by those who raised the question, that the exchange of the bonds for stock paid

the bonds so exchanged, and consequently that the holders of bonds, which had not been exchanged, *held all the property* (including the \$225,000 in extension and improvements) *as security for the unexchanged bonds to the exclusion of everybody else.*

Counsel insist that the Supreme Court of Maine decided the questions involved in this case in *Assoc. Pet'rs*, 85 Maine 19; that was a petition for the appointment of trustees to fill the vacancies occasioned by the death of two of the trustees under the mortgage of 1871. Such appointment was necessary in order to enable the holders of outstanding bonds to vindicate their rights. It was not necessary to decide any other question. The Court said: (p. 87).

"The right of all the different bondholders are not now to be distinguished; for all the facts which might have a tendency to create differences are not now before us, and any attempt to settle all conflicting claims, suggested by the history of this enterprise, would be premature. We do not now undertake to decide the relative equities between the outstanding bonds and those which were surrendered and cancelled in exchange for the stock of the new corporation, nor to decide the status of the new organization and its new issue of bonds."

In the case at bar, all the facts are presented, and the court has now decided those questions which in the former case were expressly left open.

In his argument in support of the assignment of errors, the learned counsel for the Plaintiffs in Error loses sight of the distinction between the rights of trustees holding an estate *coupled with an interest* and the rights of trustees holding the naked title without any interest and without any powers, until called upon by the *cestuis* to act. The decisions cited relates to the former class and do not apply to the latter class. We have already shown that in this case, the trustees are of the latter class with no interest, rights, powers or duties, until the bondholders so decide. In the former case legislation cannot affect the rights of the trustees; in the latter case, as by the contract the majority of the bondholders have plenary powers, *so far as the trustees are concerned*, no right of the trustees is affected, by action of the majority of the bondholders, under legislative sanction especially, to produce precisely the same result directly, that they could have produced through the trustees.

To show the utter misconception, as we think, of this case by the counsel for the Plaintiffs in Error, we quote a paragraph from their brief p. 26.

After stating the incorporation of the Somerset Railroad Company and the giving of the mortgage of 1871, they say :

"Twelve years afterwards the State assumed to pass a law by force of which and the proceedings under it, the bondholders who had paid value for their bonds, were required to surrender them and take in their place, not even other bonds of the same corporation at a less rate of interest, and payable at a different time, but stock in a new corporation already encumbered with an issue of bonds for \$225,000 thus turning first mortgage bonds, without any foreclosure of the mortgage, into stock of a corporation organized under a subsequent statute in entire disregard of the provision and stipulations of the mortgage contract."

No such statute was passed : one *was* passed authorizing the bondholders, if they should see fit, to form a corporation of *bondholders* not of *stockholders* to do, themselves, *as bondholders*, what they could empower the trustees to do for them, and no more : the statute not only did not "require" them to surrender their bonds for stock but gave them no authority to do so ; no "stock" was contemplated or even authorized by the statute.

If, while the bondholders were thus in possession operating the railroad, the mortgage should be foreclosed, *then*, not by the statute of 1883, but by the statute of 1857, their bonds practically became stock.

All that the statute of 1883 authorized was for the bondholders to form a corporation, *as bondholders*, and operate the railroad for their common benefit. There was no "turning of bonds into stock" save by force of the statute existing when the mortgage was made.

When the contingency happened (*i. e.* the foreclosure) by which the bonds were practically "turned into stock" under the old statute, the mortgaged property was unincumbered, and the stock into which each holder's bonds were turned, represented precisely, the same interest that his bonds had represented

Do the necessities of the case for the Plaintiffs in Error require the antedating of the \$225,000 mortgage for more than four years ? The bonds were *never* turned into "stock in a new corporation

already incumbered with an issue of bonds for \$225,000" or any other sum.

We have no occasion to dispute the general principle stated by counsel in relation to the foreclosure nor question the correctness of the decisions, cited in their support. The trouble for the Plaintiffs in Error is, that they do not apply to this case, as already stated :

1. Because at the time this mortgage was made, the law provided for a foreclosure by proceedings in Equity.

2. And if not, the three years right of redemption was a right of the mortgagor, which it could waive and in this case did waive. It will not be disputed that the mortgagor could have released this right by deed, and submitting to a judgment is of equal validity with a deed.

Will it be said that a foreclosure under a subsequent statute in a different form from that existing at the time of the mortgage is not valid, when the mortgagor assents to, and confirms such foreclosure? Is there any more solemn or binding method of assenting to the change of method, than by submitting to a judgment of the Supreme Court of the State based upon that method?

The reply to the argument for the Plaintiffs in Error upon all the assignments from the fifth to the ninth inclusive, is, that that argument is based upon an utter misconception of the facts and the statutes upon which the case depends; and, that with the exception of one single point, a restatement of the case is all the reply needed.

The exception is the amazing statement on page 39, that

"Under the mortgage foreclosure, the bondholders become tenants in common of the railroad property, and as many as wish are entitled to become members of the corporation provided for by the mortgage. No one is obliged to become a member *volens volens*."

There is no "corporation provided for by the mortgage:" we presume the word "mortgage" is a clerical error for "statute." But the statute is to no such effect. It provides absolutely that upon foreclosure of the mortgage the holders of the bonds "are constituted a corporation as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties and obliga-

tions of the original corporation by its charter;" and the trustees must "*convey to such corporation*" all the right, title and interest which they had by the foreclosure thereof."

The mere reading of the statute is a complete answer to the argument and shows that upon foreclosure all the bondholders do become members of the corporation, *nolens volens* and remain so as long as they hold the bonds—and if they part with them, the purchaser takes their place. As *this* statute was in force when the 1871 mortgage was executed, it became a part of the contract.

We desire also to call to the attention of the court, that the statute provides that the trustees shall convey "all the right, title and interest which they had, etc.;" it does not say "the title;" if the trustees have taken possession, they *do* have an interest which must be conveyed by deed; but the title held by these trustees, who are merely the depository of the naked legal title, may pass by *operation of law*. Such has been the law and practice in Maine, ever since it became a state: in almost numberless instances, the mere title to property used for religious purposes in Maine is taken in the name of trustees, who are not a corporation; their successors are elected annually, and the title vests in these successors by operation of law: and many statutes have been enacted assuming that such trustees have no rights, and that the only persons who have rights are those for whose benefit the property is held; and the Legislature has often upon the request of the beneficiaries authorized some one to convey the property for their benefit. So in this case, the title passes by operation of law, and at the request of those interested the Legislature may intervene without violating any *vested rights*.

Our reply to the argument for the Plaintiffs in Error is:

1. That under the provisions of this mortgage and the peculiar statutes which in law make a part of it, the trustees had no *vested rights* whatever, and, therefore none have been impaired.

2. That the Act of 1883, extending the provisions of the Act of 1878, is an enabling act to be accepted by the bondholders or not, as they should see fit, and, therefore, is not unconstitutional as impairing their rights.

8. That under the powers given by the mortgage and the statutes which make a part of it, the power is given to a majority of the bondholders to speak and act for them all, so far as accepting the privileges conferred by this act is concerned.

4. That the act was accepted by a majority of the bondholders in behalf of them all.

5. But if it shall be held that the assent of all the bondholders must be given, the evidence shows that they did all assent, first by the actual vote of a very large majority (including all but less than \$40,000 of the outstanding bonds) and the remainder by *acquiescence for seven years*. It is said that "Silence gives consent:" silent acquiescence for seven years, if ever acquiescence gives assent, is certainly equivalent to actual consent.

6. That the foreclosure was authorized by the statute giving the court equity jurisdiction: and if not, the mortgagor had the power to waive its rights and did waive them, and the foreclosure was binding upon it

7. That as a majority of the bondholders had the right to have a foreclosure through the trustees for the benefit of all, they had the right to accept the waiver of the mortgagor, and the foreclosure, as it was made also for the benefit of all; as well as the purchase of the equity of redemption.

8. That by the foreclosure all the bondholders were "constituted a corporation" with all the powers of the original corporation.

9. That the action of the Somerset Railway was equivalent to an organization of the corporation, and so became the corporation provided for in the statute, of which every bondholder was a member and in which his bonds were the equivalent of stock.

10. That as the trustees had never taken possession nor done any act in that capacity, the title to the property vested in the corporation by operation of law and the statute of 1887, to be held for precisely the same purposes as if the trustees had been the instruments of foreclosure.

11. That the Somerset Railway, composed of all the bondholders, with their bonds practically turned into its stock, the

precise equivalent of the bonds, then owned the railroad free from all incumbrances.

12. That thereafter, that corporation proceeding legally executed the \$225,000 mortgage and with the avails of the bonds secured thereby, extended its railroad, of which improvement each stockholder whether by stock or bonds, has the benefit.

13. That, if these views shall not be sustained, yet inasmuch as the Somerset Railway claiming to own the property and being in possession of it, mortgaged the railroad, issued bonds and sold them to the public and expended the proceeds in improving the property, and the holders of the outstanding bonds stood by and without taking any measures to prevent it, saw all this done, they shall not now be permitted to claim this property, except subject to the burden put upon it for the benefit of the property and with their presumed consent.

14. That if it shall be held that the proceedings of the Somerset Railway are void, so far as the foreclosure of the mortgage is concerned, all the bonds are in full force and stand upon the same plane of equity and right, and each one represents its proportionate amount of the mortgaged property, subject to the lien of the \$225,000 mortgage put upon it with the consent of all concerned.

The theory of the Plaintiffs in Equity, that the exchange of the bonds for stock in a corporation which they say never existed. *paid those bonds* or deprived them of the security of the mortgage is too abhorrent to law, equity and common sense to require discussion. If any bonds exist as bonds, all that ever were issued, so exist "and are equal before the law."

E. H. Walker
James H. Brown



12415.
Pr. of Webb & Drummond for D.
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1897.

Filed Oct. 7, 1898

Office, Supreme Court, U. S.

FILED

OCT 7 1898

No. ¹²~~124~~

LEWIS PIERCE ET ALS.,

JAMES H. MCKENNEY,
Trustees, CLERK.

Plaintiffs in Error,

vs.

SOMERSET RAILWAY.

No. ¹³~~134~~

LEWIS PIERCE ET ALS., Trustees,

Plaintiffs in Error,

vs.

JOHN AYER ET ALS.

BRIEF FOR DEFENDANTS IN ERROR.

EDMUND F. WEBB,

JOSIAH H. DRUMMOND,

JOSEPH W. SYMONDS,

of Counsel for Defendants in Error.

PORTLAND, MAINE :

WILLIAM M. MARKS, PRINTER.

1898.

IN THE
Supreme Court of the United States,
OCTOBER TERM, A. D. 1897.

No. 184. LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,
vs.
SOMERSET RAILWAY.

No. 185. LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,
vs.
JOHN AYER ET ALS.

These suits, involving the same controversies, are presented to the Court together.

STATEMENT OF THE CASE.

On March 19, A. D. 1860, the Somerset Railroad Company was incorporated by the Legislature of Maine and authorized to build a railroad from Carratunk Falls in Solon to West Waterville, now Oakland.

See brief of Plaintiff in Error, page 54, etc.

The Company was organized under this charter in 1871 and on July 1st of that year it executed a mortgage of all its property to Lewis Pierce et als., trustees, and their successors in joint tenancy.

See Case page 17, etc.

The mortgage was in trust for the benefit of the holders of the bonds of said Company, and authorized an issue of \$500,000 of bonds, payable in twenty years from July 1, A. D. 1871, with interest coupons annexed payable semi-annually, and said corporation on said first day of July issued and sold said bonds to the amount of \$450,000, the proceeds of which were applied to the building and equipping of said railroad.

The Company built a railroad from Oakland to Norridgewock in 1873; from Norridgewock to Madison in 1874; from Madison to Anson Village in 1876, making in all twenty-five miles of railroad built by the Somerset Railroad Company, which was all of the present railroad that was constructed by the Somerset Railroad Company. The Company operated this line of railroad from Oakland to Anson until September 1, A. D. 1883.

On April 1, A. D. 1883, and for a long time prior thereto, said Somerset Railroad Company was insolvent and unable to meet its indebtedness as it matured. Some creditors had commenced legal proceedings and others had threatened them. On July 13, A. D. 1883, the indebtedness was ascertained and determined by its stockholders at a meeting thereof to be :

Floating debt over all assets,	\$ 51,435 67
Interest on the same—estimated,	36,000 00
Interest due on bonded debt,	\$280,048 76
	<hr/>
	\$867,484 43
Bonds issued, but not then due,	450,000 00
	<hr/>
Total,	\$817,484 43

No coupons of said bonds had then been paid for more than three years, thus creating a breach of the condition of the mortgage.

By the provisions of Chapter 51 of the Revised Statutes of 1871, in force when this mortgage was given, corporations could be formed by the holders of bonds secured by a railroad mortgage in certain cases, as set out in the brief of the Plaintiff in Error, commencing on page 59: Sec. 67, p. 72.

In 1878 (*ibid* page 70) these provisions were extended to the holders of bonds of such corporations in cases in which the

principal of the bonds should have remained over due for the space of three years, and by an Act approved March 6, A. D. 1883, these provisions were extended as follows :

"Sec. 3. The provisions of Chapter fifty-three of the Laws of one thousand eight hundred and seventy-eight shall apply to cases in which no interest has been paid for more than three years, as well as to cases in which the principal has been over due for more than three years, as herein provided."

Under this provision, the holders of the bonds of the Somerset Railroad Company, following precisely the method provided in the statute, on the 15th day of August, A. D. 1883, formed a new corporation under the name of the Somerset Railway.

Without going into details, the case shows, and the Supreme Court of Maine have found as fact, that in forming this new corporation the bondholders proceeded in exact accordance with the statutes of the State.

The capital stock of the new corporation, called the Somerset Railway, was \$736,648.76, made up as follows: \$450,000 outstanding bonds secured by mortgage as principal; \$286,648.76 as interest on said bonds, due August 15, A. D. 1883, and then unpaid, in accordance with the provisions of the statute.

Previously, however, (to wit, July 13, A. D. 1883,) the stockholders of the Somerset Railroad Company at their annual meeting had voted that the mortgage bondholders organize a new corporation under the statutes of the State, and take possession of the railroad, and at the same meeting voted to surrender possession of said Somerset Railroad Company to the new corporation, to wit, the Somerset Railway, one of the Defendants in Error.

Thereupon the Somerset Railway, on September 1, A. D. 1883, took possession of the railroad from Oakland to Anson, twenty-five miles, and the other property embraced in the mortgage, and have ever since held and operated the same. The capital stock of the Somerset Railway was divided into shares of one hundred dollars each, to the amount of the bonds and over due coupons, as the law provided.

While the holders of a very large majority of the bonds, including some held by the parties in whose interest the Plain-

tiffs in Error are acting, participated in the formation of this corporation, it is admitted that the holders of all the bonds did not so participate—a majority of all the bonds being sufficient under the statute for the regular formation of the corporation.

The statute contemplated that the bonds should be surrendered to the Company and its stock issued therefor, dollar for dollar. The majority of the bonds were so surrendered to the Somerset Railway and are now held by it and stock issued therefor, the amount being at the time this complaint was instituted in the said Court—February 18, 1892—\$339,400, and the amount of bonds with the over due coupons thereon not surrendered was \$110,600 not counting over due coupons. The Railway has repeatedly offered and still offers to issue its capital stock to all the holders of the bonds as provided by law.

FORECLOSURE OF MORTGAGE.

When this mortgage was executed, the following was the statute provision, from Chapter 51 of the Revised Statutes of 1871:

"SEC. 70. The Supreme Judicial Court, in addition to the jurisdiction specifically conferred upon it by this chapter, may have jurisdiction, as in equity, of all other matters in dispute arising under the preceding sections relating to the trustees, mortgages, and the redemption and foreclosure of mortgages; but not to take away any rights or remedies that any party has and may elect to enforce at law; and in all proceedings relating to trustees or to mortgages, their foreclosure and redemption, not otherwise provided for herein, the law relating to trusts and mortgages of real estate may be applied."

Said Pierce et als., trustees, under said mortgage, never entered into possession of said Somerset Railroad Company, nor took any measures to secure a foreclosure of said mortgage of July 1, A. D. 1871, for breach of condition thereof. Said property remained in the possession of said Somerset Railroad Company until the formation of the new corporation—the Somerset Railway, one of the defendants in error, as hereinbefore stated.

On March 6, A. D. 1883, the Legislature of Maine enacted the following provision of Statute:

"SEC. 4. Whenever the principal of any scrip or bonds issued by a railroad corporation shall have been due and payable more

than three years, or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or, if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds may commence a suit in equity for the purpose of foreclosing such mortgage, and the court may decree a foreclosure of such mortgage unless the arrears are paid within such time as the court may order."

Chapter 166 of the Laws of 1883.

An examination of the provisions of the statute in relation to the trustees of railroad mortgages, Revised Statutes, Chapter 51, Sections 47 to 52, inclusive, which are not at all modified by the provisions of this mortgage, shows that such trustees merely hold the title *without any interest whatever in the property*. In other words, they are the mere depositaries of the title of the mortgaged property for the benefit of the bondholders. The bondholders may remove them and elect new ones in their stead at pleasure. The trustees (Sec. 49) cannot take possession of the road until the bondholders so vote, and until the bondholders so vote they can do no act whatever as trustees, and when they can act, they are subject to the full control of the bondholders; and the Act of 1883 just quoted was enacted with direct reference to these provisions of the statute.

Under this Section, and in strict accordance with it, a majority of the bondholders, in behalf of themselves and all the others, on April 18, A. D. 1883, brought a bill in equity against the Somerset Railroad Company for a foreclosure of this mortgage, to inure for the benefit of all the bondholders. (See Case, page 81, etc.)

The Somerset Railroad Company appeared and demurred to the bill, but the demurrer was overruled, and the allegations of the bill being found to be true, an interlocutory decree was entered on the third Tuesday of October, A. D. 1884, that upon the defendant's paying the amount of the coupons then over due, as particularly alleged in the bill, on or before the first day of July, 1885, the complainants should take nothing by their bill, but in default of the payment of the coupons, it was ordered and decreed that the defendants do stand absolutely debarred and foreclosed of, and from, all equity of redemption of, in and to

said mortgaged premises; and on the first day of April, A. D. 1887, it appearing that the respondents had paid nothing, a final decree of foreclosure was entered in the case. This judgment remains in full force; no writ of error was brought to this court, and the judgment remains as an absolute judgment of the Supreme Court of the State of Maine.

In the meantime, a creditor of the old corporation, the Somerset Railroad Company, had commenced an action and obtained judgment and execution against it, and complying strictly with all the statutes of Maine relating to the manner, all its right of redemption in the mortgaged property was, on the 8th day of July, A. D. 1884, sold on execution and purchased by the Somerset Railway, and the right of redemption conveyed to it by the sheriff serving the execution. (See Case, page 79, etc.)

Under the laws of Maine, the Somerset Railroad Company had one year to redeem from this sale. It never did redeem, so that on the 8th day of July, A. D. 1885, all its right of redemption ceased, and all its interest in the mortgaged property became the property of the Somerset Railway, which, by Section 2 of Chapter 166 of the Laws of 1883, this corporation had the power to become the purchaser. The section is as follows:

"SEC. 2. Any corporation formed under the provisions of Chapter 51 of the Revised Statutes, and acts additional thereto, by the holders of mortgage bonds are empowered to acquire by purchase the right of redemption under the mortgage securing such bonds."

The Somerset Railway holds or represents a very large majority of \$450,000 of bonds originally issued. A large portion of the outstanding minority bonds held by the parties carrying on these suits in the name of Pierce et als., trustees, were represented by the then owners of said bonds at the meeting to organize the Somerset Railway, and at the meeting of its stockholders and directors thereafter held.

Of the \$110,600 of the original bonds still outstanding, the holders of \$73,700 participated in the organization of the Somerset Railway and the subsequent proceedings. The amount now outstanding that did not participate in such organization, but whether participating in these proceedings or not, does not appear, is \$36,900 out of the total issue of \$450,000.

The foreclosure of the mortgage, insuring for the benefit of all the bondholders, of course insured for the benefit of the Somerset Railway, which also owned the right of redeeming from the mortgage when it existed, so that the present Somerset Railway holds not only by the foreclosure of the mortgage, by the proceedings above referred to, but also by the purchase of all the rights of the Somerset Railroad Company, the original mortgagor.

Being such owners and so in possession, in 1888 the Somerset Railway built the railroad from North Anson to Embden, an extension of the twenty-five miles of railroad which the Somerset Railroad Company had built from Oakland to North Anson village; and in 1890, it continued the building of said railroad from Embden to Bingham, making in all sixteen miles of the railroad built by said Somerset Railway after it became a corporation, in addition to that previously built by the Somerset Railroad Company. It also built a branch in 1888, about one mile in length, to the Dodlin Quarry, and has operated the whole of the main line and said branch, a part since September 1st, A. D. 1883, and the remainder since 1888 and 1890.

To secure the means of extending said railroad, said Somerset Railway, by due authority of law, issued its corporate bonds on the first day of July, A. D. 1887, to the amount of \$225,000, payable in twenty years from their date, and to secure the same mortgaged its entire railroad from Oakland to Bingham, forty-one miles.

Said bonds were all sold by said Somerset Railway in A. D. 1888, and the proceeds were applied in building the road from North Anson village to Bingham village, sixteen miles, and the Dodlin granite quarry branch, one mile, and in additional equipment of its entire line of forty-two miles.

The mortgage given by the Somerset Railroad Company of July 1, A. D. 1871, included the roadbed from Oakland to the terminus of the road in Solon, but said Somerset Railroad Company had only constructed twenty-five miles from Oakland to North Anson village.

The mortgage given by the Somerset Railway in 1887, embraced the railroad actually constructed by the old Company twenty-five miles in length as well as the sixteen miles actually

constructed by the new Company after the foreclosure of the 1871 mortgage.

The giving of this mortgage in 1837 was a matter of public notoriety and well known to the trustees of the original mortgage and all the parties for whom they are now acting, but no objection was made in behalf of any one, but the parties now prosecuting this litigation stood by and saw this mortgage given and the bonds sold to innocent parties, and the money expended in extending the railroad sixteen miles, and it was not until more than five years afterwards, when the railroad had been built and completed and was in operation to Bingham, that these suits at law were commenced.

The litigation in these cases began with two writs of entry, both dated December 3, A. D. 1892, one in Kennebec County, the other in Somerset County; in which these plaintiffs in error were plaintiffs as trustees under said mortgage of July 1, A. D. 1871. The defendants named in said writs were: John Ayer et als., who were respectively the president, superintendent, treasurer, auditor, conductors, and station agents of said Somerset Railway.

The plaintiffs, Pierce et als., trustees, sought to recover the possession of the railroad, roadbed, real estate, depots, fixtures, and rolling stock in the possession of said Ayer et als., defendants in error, and servants of said Somerset Railway; and said plaintiffs also sought to recover mesne profits against said president, superintendent, treasurer, auditor, conductors and station agents, as officers and servants of said Somerset Railway.

Under said writs of entry, the plaintiffs, said Pierce et als., trustees, claimed that the said defendants, the president, superintendent, treasurer, auditor, conductors and station agents of said Somerset Railway, were disseizors.

Inasmuch as said suits at law could but partly litigate the contention between the parties and were inefficient to secure the ends of justice, because there were grounds of equitable relief not equally available at law, said Somerset Railway, one of the defendants in error, in February, A. D. 1893, brought a complaint in equity to the Supreme Judicial Court of the State of Maine, praying the court to take jurisdiction of all matters stated

in said complaint in equity and in said suits at law, and to consider and determine the entire controversy between said parties in one proceeding, and that said Pierce et als., be enjoined from prosecuting said suits at law.

The court did so take jurisdiction of all of said cases and determined all the controversies arising between said parties, as appears in the opinion of the court in

Somerset Railway in Equity v. Lewis Pierce et als., 88 Me., 86.

and in

Lewis Pierce et als. v. John Ayer et als., 88 Me., 100.

and granted a perpetual injunction.

The precise claim in behalf of the parties prosecuting this suit, through the Plaintiffs in Error, was that all the proceedings of the bondholders were, and are void; but yet that the exchanging of their bonds for stock in the Somerset Railway was an *absolute* payment of the bonds so exchanged; and that consequently the parties, who should not exchange their bonds for stock, though holding less than an quarter of the original amount, still hold their bonds and overdue coupons with interest as a debt against the whole property and are entitled to full payment so far as the whole property will go. And they say "the whole property," means not only the railroad as it existed up to 1887, but also the new part of the railroad built with funds derived from the sale of \$225,000 in bonds issued by the Somerset Railway in 1887 and secured by a mortgage made by that company!

In other words, they claim, that, while all their bonds originally were a first lien *on less than a quarter of the property in value*, their associate bondholders have so proceeded that while the latter have received nothing, they have given to the former not only the whole property that was actually mortgaged, but also property costing \$225,000 in addition.

On the part of the Somerset Railway, it is contended that the foreclosure proceedings are valid, and cut off all the rights of the old Somerset Railroad Company, mortgagor, and that said Somerset Railway, having acquired the right of redemption by purchase on execution, and no redemption from that purchase having been made within the time allowed by law, has acquired

the full title; and that, as the matter stood previously to 1887, the Somerset Railway Company held the title *in form of law*, but that really every bondholder owned an interest in the mortgaged property, according to the amount of the bond which he held. In other words, that the foreclosure of the mortgage inured for the benefit of all the bondholders, and that nothing has been done to give the preference to the outstanding bondholders, which they claim.

The original company was insolvent; all that the bondholders had to look to was the property; and this property was held by the Somerset Railway for the benefit of all the bondholders, proportionally to their interests—a claim that is most certainly in accord with justice and equity.

Later on, for the purpose of adding to the value of the property already in existence, the Somerset Railway, acting still in behalf of all the bondholders, holding that they held the legal title to the property, determined to complete the extension of the road to the original terminus, or near it. To raise money for this purpose, it issued its bonds and secured them by a mortgage of the property by vote of the corporation at a meeting held upon full and ample public notice. While the record shows that there were negative votes upon the proposition to issue the bonds, nothing appears in evidence in this case that any question of the *right* of the Somerset Railway to do so was even suggested. No one protested against the action, but a few assuming that the Company had the power to do what was proposed, voted against it evidently on the ground of expediency. See S. S. Thompson's letter, Case p. 188.

As already stated, upon these facts the Supreme Court of Maine has found in favor of the contention of the Defendant in Error, that by the proceedings of the bondholders the Somerset Railway did acquire a title to the property, and that its action in mortgaging the road to secure funds to complete the extension was valid, and especially that the Plaintiffs in Error, and those who they represent, after participating in the proceedings as they did, and making no objection to their *legality*, are estopped now for setting up any such claim.

ASSIGNMENT OF ERRORS.

Coming now to the various assignment of errors, we find them so complicated that it is difficult to take them up one by one, in the order in which they are presented, but we believe the points made, or intended to be made, can be readily stated :

I. One of the main propositions of the learned counsel for the Plaintiff in Error is, that the foreclosure of the mortgage of 1871 was illegal and void, because made under statutes which were enacted after the date of the mortgage.

1. The first question is, whether, *if this is so*, it is a question in which the Plaintiffs in Error are interested, and which they can raise.

The statutes, giving a right to redeem property from a mortgage, and prescribing methods of foreclosing such right, were enacted for the *benefit of the mortgagor*, which, in this case, was the Somerset Railroad Company. That Company might have released its right of redemption entirely by a voluntary deed, and upon the same ground it could waive any irregularities, and especially it could waive the question of the constitutionality of the statute providing the method of foreclosing the mortgage. That corporation had its day in court, and upon due notice and hearing, the court holding in effect that the statute under which the proceedings were taken was constitutional, decreed as against the Somerset Railroad Company, a foreclosure of this mortgage. The demurrer filed by the then defendant (See Case pp. 189—190) expressly raised the question of the right of the then plaintiffs to maintain the bill, and alleged that it could be maintained only by the trustees, and also raised the question whether the statute was retroactive and would apply to that particular case. By overruling the demurrer, the Court passed upon the very question now raised, and decided then against the contention of the then defendant and entered a decree, as against the Somerset Railroad Company of foreclosure of this mortgage, notwithstanding. From that decree, no appeal was taken, and no writ of error has been brought to this court to reverse that judgment, and the time for bringing such a writ has long since expired.

If anything is settled, it is that such a judgment, although possibly erroneous, is binding upon the parties to it.

What right have these plaintiffs in error to come into court and set up an alleged right of the Somerset Railroad Company, which it has itself expressly and solemnly surrendered by submitting to the judgment of a competent court?

We repeat, that in the question of the constitutionality of the statutes, the Somerset Railroad Company or its privy in estate alone was interested, and that Company is not only estopped by the judgment, but has never shown the least inclination to set up such a right.

2. But the case upon this point is still worse for the Plaintiffs in Error; for all the rights of the Somerset Railroad Company in, and to its railroad have passed by legal conveyance to its privy in estate the Somerset Railway, the Defendant in Error, and we have the ludicrous spectacle of parties coming into court and undertaking to say that this Defendant in Error has been deprived of one of its rights, and calls upon this court to restore it that right, in spite of its own protest!

If any party in the world, save the Somerset Railroad Company, can raise the question of the legality of the foreclosure, as affected by the constitutionality of the statute under which it was made, it is this Defendant in Error, the Somerset Railway, which, instead of asking the court to intervene to pronounce the foreclosure invalid, has from the first set it up as a basis of its title. Whatever view we take of it, we have the spectacle of creditors coming into court and saying that the mortgage which they hold has not been legally foreclosed, on account of the invasion of the constitutional rights of the debtor, who has not only acquiesced in the legality of the foreclosure, but strenuously maintains it!

3. But the foreclosure was entirely valid.

The law existing at the time the mortgage was made, expressly gave to the Supreme Court of Maine the power to foreclose a railroad mortgage, according to the usual proceedings in equity.

Rev. Stat. Ch. 51, Sec. 70.

It is true that by a later statute, the bondholders were author-

ized to commence proceedings, instead of having them commenced by the trustees. The Supreme Court of Maine holds that this was a mere change in the form of the remedy and no change of the rights of the parties.

The bondholders were the real parties in interest. By the statutes of Maine, the foreclosure of such a mortgage inures directly for the benefit of all the bondholders, and all the change in the statute was giving the bondholders, themselves, the real principals, the remedy, instead of having them seek it through the trustees.

But the case is argued as if the trustees had rights and interests in the mortgaged property. We have already pointed out that such is not the case. They are mere depositaries of the title, which the bondholders can take from them and vest in others at any time they please, and there is no single act relating to the property that the trustees can perform until so directed by the bondholders, unless we except the power of calling a meeting of the bondholders to see what they will do. They are not really trustees; they are agents, really, whose powers can be taken away at any time, at any rate, upon payment of any sum which may be due them for services. In this case no such claim is made, and the evidence is plenary that at the time of the foreclosure of the mortgage, the trustees had performed no services whatever, and had been called upon to perform no services; so that we say that the change in the method of seeking a foreclosure in equity by the Legislature of Maine, was wholly within its power.

The statute created no breach of the mortgage; its conditions had already been broken, and the bondholders were entitled to have it foreclosed, and the statute relates only to the method of proceeding when a breach of the conditions of the mortgage had taken place, and been continued not less than three years.

As a matter of fact, in this case many of the coupons due in 1871 and 1872 had never been paid, and a breach of the mortgage justifying a foreclosure had existed more than ten years.

Nor was the result of the proceedings by these bondholders one whit different from what the result would have been if the proceedings had been in the name of the trustees. In both cases, by

the statute of the State, existing long prior to the time when the mortgage was given, a foreclosure of it, by any method, inured to the benefit of all the bondholders, of course in proportion to their several holdings.

We believe that it is sound law that a party has no vested right to a particular remedy as against another remedy, especially when both remedies are based upon the same facts, and give the same result. What difference did it make whether this mortgage was foreclosed by the trustees, by direction of the bondholders, and for their benefit, or by the bondholders themselves, for their own benefit? What rights were taken away from any of the bondholders thereby, as alleged in the assignment of errors?

In the one case, a majority of the bondholders order the trustees, their agents, to do a particular thing; in the other, a majority of the bondholders do it themselves; in both instances for the benefit of all. Can it be said that this change is anything more than a change of the remedy, making it, in the language of the Supreme Court of Maine, "more efficient."

The valid foreclosure of a mortgage, as against the parties having the right to redeem, is valid as against everybody.

This proposition is so fully supported by innumerable decisions that the citation of cases seems entirely unnecessary, but the case of *Barnes v. Chicago, etc., Railway*, 122 U. S. Sup. Ct. Reports, 1 to 59, has so many points in common with the cases at bar that we shall be pardoned for referring to it.

In that case, the trustee of a subsequent mortgage proceeded to sell under his trust at the request of the required number of bondholders, and at the same request purchased it in himself at the sale, and then conveyed it to a corporation which had been formed by a portion of the holders of the bonds secured by that mortgage.

Thereupon creditors, claiming that the foreclosure was fraudulent as to them, brought a bill in equity to set it aside; the Court found that their allegations were sustained, and made a formal decree that the foreclosure was null and void.

The trustee, assuming that the foreclosure had been absolutely set aside, commenced a bill in equity to take advantage of alleged

frauds and irregularities in the foreclosure of prior mortgages, but the Court held that the decree in the former case must be narrowed according to the allegations of the bill, and held that the foreclosure had been set aside *only so far as the creditors were concerned* and that it was valid for *all other purposes*, and the bill brought by the trustee was dismissed. In other words, it was held that the judgment of foreclosure was valid as against everybody except as to those creditors who brought the bill in the same court to set aside the decree, so far as they were concerned. They did not attempt to impeach it in another case, and the Court proceeded upon the grounds that the foreclosure was valid as against everybody except so far as was otherwise adjudged in a proceeding to open the foreclosure for a particular purpose.

But it was urged in the State Court by the learned counsel for the plaintiffs in error that the foreclosure of this mortgage was void because it cut off the right of redemption which the Somerset Railroad Company was alleged to have for the term of three years. That question was raised by the demurrer in the foreclosure suit, and yet the Court decreed a foreclosure.

It should be observed that even in the case of mortgages of real estate, no statute of Maine expressly gives a right of redemption of three years. The right is given indirectly in prescribing the modes in which a mortgage may be foreclosed. Chapter 90 of the Revised Statutes of 1871 prescribed the methods. The statute first gives three methods of proceeding, when the mortgagee, after breach of condition, desires and can get possession, and the provision is that possession obtained in either of these three modes and continued for the three following years, shall forever foreclose the right of redemption.

Provision is also made for foreclosure without obtaining possession, by two modes, and it is provided that if the premises are not redeemed within three years after publication of the notice of foreclosure prescribed, the right of redemption is barred.

No statute in existence in 1871 expressly gave a right of redemption for three years in case of railroad mortgages. But a method of foreclosure by publication was given with the provision that unless the arrears were paid within three years the mortgage would be foreclosed.

The provision for foreclosure by Proceedings in Equity then follows as already quoted.

In view of the positive terms of this statute giving jurisdiction in equity to foreclose, this objection is manifestly not well taken. The remedies are concurrent, and the remedy in equity given by Section 70 of Chapter 51 above quoted, is cumulative with the ones given in the statute.

It necessarily follows from the giving of the remedy in equity that the statute contemplates that the proceedings shall be in accordance with the usual methods in equity and therefore that a strict foreclosure is authorized.

And such has been the practice in Maine. In 1877, the present Justice of the United States District Court for the District of Maine, commenced a bill in equity in our State Court for the strict foreclosure of a mortgage of a railroad given in 1870, and, while the case was adjusted without proceeding to judgment, the power of the Court to order such a foreclosure was not questioned. But there was a second mortgage of the same railroad, dated November 1, 1871, to secure bonds issued by the corporation. The railroad mortgaged to secure these bonds lay partially in the State of Maine and partially in the State of New Hampshire. A holder of bonds, which had been dishonored by the non-payment of coupons, commenced a bill in equity in the Circuit Court of the United States, in the District of New Hampshire, praying for a strict foreclosure of the mortgage of so much of the railroad as was situated in that State; and immediately after, a bill in equity for a strict foreclosure was filed in the Supreme Court of the State of Maine. Various bondholders intervened in both courts, a number desiring the foreclosure by the United States Court in New Hampshire of the part of the road lying in New Hampshire; others claimed a foreclosure of the whole railroad, and finally, by agreement of parties it is true, though after the case had been argued, a decree was entered by his Honor, Judge GRAY, in the United States Circuit Court for the New Hampshire District, for a foreclosure of the mortgage, unless the mortgagors and those claiming under them, should pay the arrears within six months. The Supreme Court of Maine, in ancillary proceedings, passed the same decree.

The over due interest not having been paid within the six months, decrees of strict foreclosure were ordered by the United States Court in New Hampshire, and the Supreme Court of Maine, covering the whole road, and today the title to the Portland & Ogdensburg Railroad rests upon that decree, and its validity has never been questioned.

II. But it is claimed and vehemently urged that the Somerset Railway was never a legal corporation.

It early became apparent that the management of a railroad by trustees, as such, was not only inconvenient but substantially impracticable. Usually they were selected without the slightest reference to any experience or ability in the practical operation of railroads; so that our statutes, while recognizing the necessity of having trustees to hold the title, and by direction of the bondholders, to do certain acts, have provided for the speedy transfer of the operation of the railroad in such circumstances to a corporation.

As early as 1857, a statute was enacted applying to mortgages then in existence, as well as future mortgages, that the foreclosure of such a mortgage should inure for the benefit of all the bondholders, and the bondholders become as of the day of foreclosure, *ipso facto*, a corporation, to be organized by a choice of officers, and possessing all the powers, privileges, rights and immunities of the original corporation under its charter.

By various statutes between 1857 and 1883, this authority to organize a corporation was extended, first, to the cases of railroads in which the principal of the bonds was over due, and finally, to cases in which the coupons should be over due for more than three years. This statute did not, like the former, declare that upon the happening of such a contingency, the bondholders should be *ipso facto* a corporation, but *authorized the bondholders* to form such a corporation, in order that they might operate the railroad and manage the property by officers chosen by themselves, instead of the cumbrous method of doing so through the trustees. Such a corporation could be formed only by the voluntary action of the bondholders, and upon application of those holding a majority of the bonds issued; and at a meeting called for the purpose, upon full and ample notice, in the method

in which meetings of stockholders of corporations in Maine are almost universally called.

We submit that it was competent for the legislature to authorize the majority of the bondholders to organize a corporation to take possession of the railroad and operate it for the benefit of the bondholders, after the mortgagor had forfeited its rights to such possession.

Referring to Chapter 51, R. S., Secs. 47 to 52, we find that when a breach of the conditions of the mortgage has taken place, the trustee "shall call a meeting of the bondholders," at which meeting "each bondholder present may have one vote for each hundred dollars of bonds held by him;" the bondholders may organize "and determine whether the trustees shall take possession of such road and manage and run it in their behalf:" "*if they so determine*, the trustees shall take possession of such road and all other property covered by the mortgage" with the usual powers to operate it: they were to call annual meetings of the bondholders and report to them, who might instruct them to contract with the directors of the corporation or other competent party to operate the road; and the bondholders could give the trustees "any other instruction they deem advisable; and the trustees shall conform thereto, unless inconsistent with the terms of the trust."

It is manifest that these provisions contemplate action by a majority of the bondholders, at these meetings and in operating and managing the property, the trustees are to obey the instructions of the majority.

The change made by the Statutes of 1878 and 1883, is to substitute for mass meetings of the bondholders to instruct the trustees what to do and how to do it, a corporation formed by the bondholders and composed wholly of them empowered to do just what the bondholders could order their agents, the trustees, to do; no more and no less.

In both cases the majority act for the benefit of the whole; and in both cases, the voice of the majority is the voice of the whole.

In giving this more efficient method for managing the property, what right of any bondholder is invaded?

If the majority of the bondholders see fit to avail themselves of the new method, are they doing anything substantially different from what they could do under the old law?

If not and if the proceedings differ only in *method* from those under the old law, is not the statute authorizing them, a valid one? Do these statutes go any further than to give a new remedy for enforcing the same right with precisely the same result that the old one gave.

In both cases the possession and management of the property are controlled by the bondholders for their own benefit.

There having been a breach of the condition of the mortgage, and the contingency contemplated by the statute having happened in this case, a meeting was called by the authority of the holders of over \$350,000 of the bonds, out of the \$450,000 originally issued. At that meeting (See Case, pp. 45, etc.) \$354,600 of the bonds were represented, including the holders of over \$70,000 of the bonds now outstanding. At that meeting the bondholders voted *by a unanimous vote*, to organize a corporation, as provided by the law, under the name of the "Somerset Railway." By-laws were adopted and directors were chosen, all by unanimous vote, and they were directed to take possession of the railroad on the first day of September then next following, and were authorized to purchase the equity of redemption in the railroad and take a conveyance to the new corporation. Owners of now outstanding bonds were elected directors, and at the following annual meeting in December, were re-elected, all by unanimous vote, and served as such.

That the Somerset Railway was then legally organized as a corporation "goes without saying." Whether any one then objecting, or any one then participating and objecting within a reasonable time afterwards, became a member of that corporation might be a question, if founded in fact; but no one *did* object, and all the bondholders acquiesced therein, and in the Railway's taking possession and managing the property without any objection till years afterwards.

The corporation was organized August 15th, 1883, and, so far as the evidence shows, everybody acquiesced in the organization till 1890, when some who had participated in the organization,

and others who had acquiesced until that time, filed a bill in equity for filling the vacancies in the trustees.

From 1883 until 1887 the Somerset Railway held this property for the benefit of all the former bondholders. The bonds were the capital stock of the Company, and, whether converted into stock or not, represented an interest in the company property.

On the first day of April, 1887, a final decree of foreclosure of the mortgage in the suit for that purpose was entered. The moment that decree was entered, in accordance with the law in existence before the 1871 mortgage was made, the bondholders became *ipso facto* a corporation, which they could organize by a choice of the proper officers, in which each bond with the overdue coupons, represented a proportional part of the capital stock, made up, in amount, of all the bonds and overdue coupons. But the bondholders had already organized a corporation which was then existing. Up to that period there is not a scintilla of evidence that anybody had objected to the formation of the Somerset Railway. It was therefore deemed that the Somerset Railway, as such corporation, received the benefit of the foreclosure of the mortgage, and that all the holders of the bonds on the first day of April, A. D. 1887, by virtue of the law under which the mortgage was made, became *ipso facto* members of that corporation, each one owning the proportionate part of the property which his bond bore to the whole amount.

And the Somerset Railway at a legally called and held meeting, on the eleventh day of May, A. D. 1887, adopted a vote reciting the foreclosure of the mortgage, the purchase of the equity of redeeming the railroad and the superiority of the title under the foreclosure, and the provisions of the statute as to the capital stock, and directing the proper officers to issue the certificates of stock accordingly; thus recognizing and accepting the effect of the foreclosure as fully and completely as if the corporation had been organized *de novo*. The article in the call of the meeting, under which this action was taken, was:

"To take the necessary action to conform the organization of the company to the foreclosure of the mortgage securing the bonds upon which such corporation was formed."

A new code of By-Laws was also adopted : in fact the proceedings were *in substance* an actual new organization of the company in the manner provided by statute for the organization of a corporation by the holders.

It follows that the parties, who had not actually given in their adhesion to the Somerset Railway before that date, became members of the corporation with all their rights in the mortgaged property precisely the same as if the bondholders had gone through the useless form of organizing the corporation over again.

At that date, we repeat, each bondholder practically owned his proportionate share of the whole mortgaged property, unincumbered by any other lien, by owning his proportionate part of the stock, or, which was the same thing, the bonds representing the total mortgage debt.

But if it shall be held that the action of the bondholders in organizing the Somerset Railway did not bind those who did not participate in that action; and that the foreclosure of the mortgage did not constitute the bondholders a corporation as already organized, we submit that those who did not consent by actual participation, have consented *by acquiescence*.

When the original bill in this cause was filed, the holders of \$339,400 of the original \$450,000 of the bonds had exchanged their bonds for stock in the Somerset Railway [and while of course the case does not show it, others have exchanged since]; the case shows that the holders of \$73,700 of the bonds not exchanged, participated in forming the corporation and in its operations afterwards, making a total of \$413,100 which have actually given in their adhesion, leaving the holders of only \$36,900 which have not *expressly* consented to the formation of Somerset Railway.

As already stated, this corporation held possession of the property in the precise condition in which it received it from the old corporation, so far as other liens are concerned, and operated it for the common behalf from 1883 to 1887.

Also let it be borne in mind that during these four years, the Somerset Railway was operating the mortgaged property, without objection on the part of any one; that annual meetings of its

members (viz., bondholders) were held, at which meetings the officers made the usual reports, new officers elected, and the usual business transacted. At these meetings there was a full representation and at first four, and afterwards three of the Directors annually elected, were then the holders of bonds now outstanding.

During all this time no one made any objection to the legality of the proceedings, but all acquiesced.

At the meeting, of the bondholders (or the Somerset Railway) held May 11, 1887, after voting to conform the organization of the company to the state of things consequent upon the foreclosure of the mortgage and the ownership of the equity of redemption as well, whereby all assumed without question that the Somerset Railway secured the railroad and its appurtenances, the question of completing the railroad to the terminus named in the amended charter was considered, and, without any dissent, the directors were authorized to complete the road from Anson to Bingham.

At the same meeting, a proposition to mortgage the railroad to secure funds to complete the extension was discussed and carried by a vote of 2,600 to 596. Case, p. 60.

A mortgage was prepared to secure bonds to the amount of \$225,000, and another meeting was held August 6, 1887, to see if the stockholders would approve and confirm it; and the stockholders so voted by a vote of 2,654 to 605. In the word "stockholders," we include "bondholders," as at that time but few, of any, shares of stock has been issued; and the owners of bonds outstanding when these suits were commenced, appeared and voted. While the holders of \$10,000 of the outstanding bonds voted in the affirmative, the holders of \$60,500 voted in the negative; of the negative votes, holders of \$60,400 had participated in the organization of the Somerset Railway. Case, p. 63.

The holders of these outstanding bonds, who voted in the negative, raised no questions as to the *status* of the Somerset Railway, but voted in the negative on the ground of expediency only; indeed one of them (William H Brown) was then a director and continued to act as such in the issuing of the bonds, the making

of the mortgage and the construction of the extension, and in fact until his death. Case, pp. 76, 68.

No proceedings were taken to prevent this issue of bonds and the execution of the mortgage, and in brief the Directors went on with the business, built the extension in two sections and completed it in 1889, having secured the funds by the sale of the new bonds.

So far as the evidence discloses, *no question as to the validity of the title of the Somerset Railway to the property and its legal right to operate the railroad was ever raised until after the completion of this extension.*

It was not till July 2, 1890, that a Bill in Equity to fill vacancies in the Trustees under the mortgage of 1871 was filed, in behalf of some of the outstanding bondholders.

Assuming for the moment, that only such of the bondholders were members of the Somerset Railway corporation as participated in the proceedings or consented to them afterwards, what stronger evidence of consent could be given than is found in their acquiescence during all these years?

In the case of *Barnes v. Chicago, etc. Railroad*, already cited, the effect of a statute enacted after the execution of the mortgage was also considered. In that case after the passage of the enabling statute, the necessary number of bondholders presented a request to the trustee that he proceed to foreclose the mortgage and buy the property for the bondholders. The same was made accordingly, and the property purchased in by him. Thereupon the majority of the bondholders immediately afterwards organized a corporation under the statute to take the title from him, which entered into the possession of the property, and claimed to own it, subject only to the encumbrances of prior liens; and neither the trustee nor any bondholder, so far as the record discloses, ever asserted the contrary until a suit was decided in which the foreclosure was held to be invalid in respect to some creditors. Then, as in this case, holders of outstanding bonds undertook to repudiate the foreclosure and the formation of the new company, but the Court held that the acquiescence of the holders of the bonds was a subsequent consent to the forma-

tion of the corporation and to its claim to hold the title to the property, and they were bound equally with the rest.

The same must be true in the cases at bar.

III. The mortgage of October 15, 1887, to secure the issue of \$225,000 in bonds to complete the extension of the railroad is a valid mortgage and is now a first lien on the railroad property.

We have already discussed this proposition, but we desire to call the attention of the court specifically to it.

The mortgage of 1871 purports to embrace the whole railroad between the termini named in the charter, whether the road had been actually "located" to the upper terminus or only to Anson at that time, does not appear in this case, but the extension above Anson was not constructed until after the 1887 mortgage was executed.

Then the Somerset Railway filed an amended location of the extension from Anson to Bingham under an amendment of the charter authorizing an extension from Solon (the original terminus) to Bingham, and *on that location* constructed the railroad. The 1887 mortgage covered the old railroad and the extension built upon the amended location filed by the Somerset Railway.

If our contention, that, on October 15, 1887, the Somerset Railway actually owned the property by the foreclosure of the 1871 mortgage, is sustained this next mortgage of course was valid.

But if the foreclosure of the mortgage was not valid, the Somerset Railway had acquired precisely the same title by the purchase of the right of redemption and the ripening of the title under that purchase; and the same result follows.

But if it shall be held that the outstanding bondholders did not become members of the Somerset Railway, we contend that as that Company, owning the property subject to the 1871 mortgage, and owning over three-quarters of the bonds secured by that mortgage, and claiming to own the property absolutely, made the mortgage in behalf of all the bondholders as a prior lien, and the holders of the outstanding bonds stood by and, without objecting, allowed the railway to mortgage the railroad to raise money to add to the property, and to expend the money so

raised in extending the road, it is too late, after the bonds have been sold and the money expended, to repudiate the burden and claim the benefit. If they had rights, they failed to assert them in season, and by their own *laches* are estopped to set up those rights now.

If a tenant in common, knowing that his cotenant believed he owned the whole title, should stand by and see his cotenant mortgage the property and with the proceeds make improvements on the property, would he be allowed after the money had been so expended, to repudiate the mortgage? Much less would he be allowed to repudiate the mortgage and hold his share of the improvements. And still less would he be allowed, as the holders of the outstanding bonds are endeavoring to do in this case, repudiate the *whole mortgage* and claim not only their share of the property but also the *shares of all their cotenants!*

The mortgagees in interest of this property at the date of the 1887 mortgage, were entitled to hold the property for their debt, each one in proportion to his holdings of bonds. It was understood and assumed by all, that the Somerset Railway held the title for all the bondholders. As we have seen, a meeting of that company was held and a vote adopted *nem. con.* authorizing the directors to construct the extension; at the same meeting it was voted that the whole railroad be mortgaged to obtain the means for that purpose; a majority of the outstanding bonds attended that meeting and voted, some for and some against the mortgage. The opponents of the mortgage acquiesced, and the votes were carried out. There is not a scintilla of evidence in this case, that any one objected to the validity of the proceedings until after the money was raised and *spent for their benefit.*

The Somerset Railway held itself out to the world as a corporation having stock based upon the amount of the original mortgage debt. This was known to all the original mortgagees or bondholders. The Somerset Railway acted upon this theory and by its very organization and course of action made such representation to the world. The minority knew that the majority was in possession through the agency of the Somerset Railway. The minority knew that the Somerset Railway claimed to represent and to act for all. They knew that third parties were mak-

ing large advances of money upon the faith of such action by the majority. They knew that the majority were proceeding upon this understanding with reference to their own rights and interests, as stockholders, and with reference to the rights and interests of the minority as stockholders. The minority could prevent itself from being bound by such action only by an immediate disavowal of the acts of the majority. To be silent was to consent, and the effect of such consent was to simply place the minority in the position which the action of the majority assumed and understood them to occupy, namely, that of stockholders in the new corporation; and whether the new corporation was a legal one, or only a *de facto* one, merely a form assumed without legal authority therefor, still the rights and duties relating to it can be equitably determined and adjusted only by treating it as what it purports to be, a corporation. It held itself out to be a corporation. That is what it assumed to be; that is what the parties who dealt with it understood it to be, and the civil rights and obligations pertaining to it are in equity precisely the same they would have been if the legality of its corporate existence were not questioned.

Upon the faith of the acts of the majority and the silence of the minority, the public have invested in these bonds, which were taken without the least intimation that the minority, which had kept silent, in any manner disputed the binding force of those acts.

Would it not be an actual outrage to allow the minority to reap the benefit by keeping silence when law, equity and honor called upon them to speak, unless they intended "forever after to hold their peace"?

These principles are so well settled that we need not cite cases in their support.

But in the Court below it was argued that whatever may be the case with the original bondholders, the parties in interest in this case having purchased these bonds in the latter part of 1890, and after the acts relied upon to create an estoppel had transpired, are not bound by those acts, because the bonds are "commercial paper" purchased in the market before it was due, and without knowledge of its dishonor.

But this position cannot be sustained, because:

1. The bonds are not "commercial paper" in any correct sense of that term.
2. But the purchasers did have ample notice to put them on inquiry.

The contention is that as the bonds were not due, the mere fact, that the coupons attached were overdue and dishonored, was no notice that the purchaser of the bonds took them subject to the effect of any acts done by any prior holder of them.

This argument certainly could not apply to the overdue coupons—but the holders claim for them the same immunity.

But let us see what these purchasers knew or were bound to know. They knew that the Somerset Railway was in possession of the property claiming title; they knew that no coupons on the bonds had been paid for over fifteen years; they were bound to know the proceedings in the foreclosure suit as they were shown in the records of the court; they were bound to know of the sheriff's deed of the equity of redemption, for it was on record; they were bound to know of the filing of the location of the extension, *by the Somerset Railway*, for that was a matter of public record; they were bound to know of the 1887 mortgage *by the Somerset Railway*, with its covenants of full warranty of title as a first lien on the property, for that too was on public record. And who believes that they did not know of the construction of the extension with the funds raised for that purpose?

If all this was not sufficient to put the purchasers of these bonds on the inquiry which would have shown them the true state of affairs what would be sufficient?

Moreover as they knew or were bound to know all these facts, they must be presumed to have taken the bonds with full acquiescence in the consequences of those facts.

3. But the law relating to commercial paper is controlled by the statute relating to railroad bonds. The *status* given to a railroad bond by Statute *goes with the bond*. Every purchaser of a Maine railroad bond since 1883, is bound to know that a previous holder may have used it in the formation of a corporation and thus changed it from a negotiable instrument to a muni-

ment or evidence of title of an interest in the capital of such corporation. Especially if the coupons have been due for over three years, he is bound to know that such a corporation of the bondholders may have been formed; in this case, the coupons on these very bonds had been overdue for more than fifteen years; and who believes that in a matter of so much public notoriety these purchasers did not have actual knowledge that the Somerset Railway had been so formed?

However, whether they knew it or not, the statute in question limits the negotiability of railroad bonds, and when they are used for the purpose prescribed in it, as already stated they cease to be negotiable bonds and become the equivalent of certificates of stock in the capital of a corporation.

IV. The eighth assignment of errors claims that the mortgage specially provided that "the trustees should be the sole judges in the first instance whether any breach of the conditions of the mortgage had taken place," etc., and therefore that no foreclosure of the mortgage could be made without the determination of this question by the trustees and that a foreclosure of the mortgage without giving effect to that provision impaired the obligation of the mortgage contract.

There is no provision of the mortgage having any such scope or meaning. It provides:

Third. Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges, *prima facie* of said breach of conditions; and said company shall submit without resistance to any act of theirs for such purposes, not being bound by their judgment in a final trial and decision respecting a breach of condition.

Bearing in mind that the trustees are mere machines, with no interest in the property and no power to act until put in motion by the bondholders, the object and scope of the provision is manifest.

"For the purpose of enabling them to perform any lawful act," their decision that there has been a breach of the conditions of the mortgage is binding on the mortgagor.

In other words, after they have been called upon to perform any lawful act, their decision that there has been a breach of the conditions so that they are required to act, is binding for the time being, upon the mortgagor, and they shall not be required to resort to legal proceedings to get possession, or to do whatever act is involved.

The proposition, that there must be a decision of the trustees *in any event*, is not found in the provision ; but only the stipulation that when they are called upon to make a decision upon this point "in order to enable *them* to perform any lawful" such decision is binding on the mortgager. In other words, until they have been called upon to act, this provision gives them no power whatever ; and if they never are thus called upon, they never have this power.

This provision is usual in mortgages to trustees and its design is well understood.

SUIT AT LAW.

This is a real action by the trustee of a railroad mortgage for possession of so much of the Somerset Railway as lies within Kennebec County. The judgment should be affirmed.

I. Of course if the judgment in the Equity suit is affirmed, affirmance in the suit at Law follows as a matter of course ; but there are other defences.

II. The Plaintiffs in Error are not entitled to possession. They are mere holders of the technical title for a specific purpose for the benefit of the bondholders. They have no interest in the property whatever. They can act only as directed and empowered by the bondholders. The only power which they have is to call a meeting of the bondholders and it is only after they have called such a meeting and been directed by a vote of the bondholders at such meeting, that they have any authority whatever to take possession. Sections 47 to 52 of Chapter 51 of the revised statutes of 1871 are a part of this mortgage ; and those sections provide the only manner in which they may be entitled to possession. The bondholders are the real owners and

the so-called trustees can interfere with the property only upon the express direction of the owners. It would utterly violate the conditions of the deed, if the trustees should under any circumstances, of their own motion, interfere with the possession or management of the property without the direction of the bondholders. The deed proper and the statutes, which by law are a part of it, clearly show that the trustees hold the title as the mere agents of the bondholders to save the complication which would arise by making the mortgage directly to the bondholders, who still remain the principals without whose direction in the manner provided in the contract, their agents can do nothing.

In *Sawyer v. Skowhegan*, 57 Maine, it was held that in "passive trusts," the trustee cannot maintain a real action against the "*cestuis que trustent*": how much less so can they in this case in which the deed of trust and the law expressly provide that they shall not have possession of the property without the absolute direction of the *cestuis que trustent*.

Again, the mortgage provides that until condition broken the mortgagees shall have possession; and under section 67 of Ch. 51 of the Revised Statutes of 1871 (a part of this mortgage) the purchasers of the equity of redemption succeed to all the rights of the original company in all respects and may, therefore, operate the railroad, either as individuals or they may form a new corporation and operate it. So that the Somerset Railway, whether it be a corporation composed of all the bondholders or any part of them, or a mere partnership whose articles of association are the By-Laws which they adopted (128 Mass., 445; 60 Maine, 468;), under its deed of equity of redemption is entitled to possession until breach of condition; if, therefore, there had been no breach of condition when this action was commenced, the Somerset Railway was entitled to possession and the plaintiffs were not, and this action cannot be maintained.

If there had been a breach of condition, the mortgage and statute point out the only method of proceeding; the trustees must call a meeting of the bondholders and be directed to take possession; they would then have the right to take possession and *not till then*.

Even upon the plaintiff's assumption that the Somerset Railway is, and always has been, an absolute non-entity, the same result follows. In that case the Somerset Railroad Company would be entitled to the possession until breach, and after breach until the bondholder should direct the trustees to take possession. But it appears in evidence, and is the undisputable fact, that the defendant, John Ayer, was the last elected president, the defendant W. M. Ayer the last appointed superintendent, and the defendant A. R. Small the last elected and qualified treasurer of the Somerset Railroad Company, and being so, hold over till their successors are elected. They are the proper officers of the company to operate and manage the railroad, and their possession of it is the possession of the Somerset Railroad Company, if the Somerset Railway has no possession. The other defendants are acting under them: it, therefore, follows that as this action could not have been maintained against the Somerset Railroad Company, it cannot be maintained against these defendants.

III. But the Railroad Company had only an *easement* in the real estate mortgaged.

"And the land so taken by the said corporation as lands taken and appropriated for highways."

Charter of Somerset R. R. Co. Sect. 1.

The trustees have no greater interest or title. It is elementary law that a real action cannot be maintained whose interest is a mere easement and not a freehold. The owner of the servient estate may maintain a real action although a third person owns an easement therein. These propositions seems to us so well settled as not to need elaboration or the citation of authorities.

IV. But certain of these defendants have a defence peculiar to themselves respectively.

1. The defendant Burrill seasonably disclaimed by brief statement under the general issue any right, title or interest in the demanded premises, and denied having possession of the demanded premises. (Case, p. 8.)

The evidence shows that he was, when the action was commenced, the station agent of the Maine Central at Oakland; and the station agent of the Somerset Railway and that the station and grounds are the property of, and controlled by, the Maine Central: that Burrill in the *Maine Central office and grounds*, sells tickets for the Somerset Railway. Equity case, pp. 201-8.

And that he manages the freight that comes to or goes from the station. Ditto p. 207.

The question then is whether a man who, upon grounds to which these plaintiffs have no title whatever, sells tickets to passengers going over the railroad, and upon the same grounds manages the receipt and sending out of freight coming and going over the railroad has such a possession of the whole railroad as enables a real action to be maintained against him? He does not own the tickets: he, *of his own authority*, can give no one a license to pass over the railroad, and has no possession actual or constructive. As station master, he also loads and unloads freight in and from the railway cars, *on land of the Maine Central* and collects the money for the freight. It does not appear in this case that he ever sets a foot upon the Railway Company's premises or directs any one else to do so.

But it is a curious proposition that a station agent whose possession is limited in fact and by the authority under which he acts, to the station grounds, nevertheless has such possession of the whole railroad as to make him liable in a real action jointly with others. As judgment in a real action cannot be rendered against one defendant for one parcel of real estate, and against another for another parcel, no judgment can be rendered against one that cannot be rendered against all. While a judgment against all may be rendered for the whole or any part of the demanded premises, a joint possession and disseizin of the same parcel of land or interest therein, must be proved.

2. The other defendants Merrill and Foster have both disclaimed and denied having possession of the property. It appears that they are merely conductors who have no permanent possession of any of the property and no right to possession, save to run a specified train over the railroad.

A real action cannot be maintained against a mere trespasser, unless at least he was actually upon the premises when the action was commenced. It does not appear that either of these defendants were so in possession. It is submitted that the possession of a conductor is not inconsistent with the disclaimers in this case.

EDMUND F. WEBB,
JOSIAH H. DRUMMOND,
JOSEPH W. SYMONDS.

Of Counsel for Defendants in Error.

Opinion of the Court.

defendants in error. *Mr. Joseph W. Symonds* was with them on the brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is a writ of error directed to the Supreme Judicial Court of the State of Maine, for the purpose of reviewing a judgment of that court in favor of the defendant in error, who was plaintiff below. 88 Maine, 86-100. The facts necessary to an understanding of the case are as follows:

The Somerset Railroad Company was organized in 1871, pursuant to an act of the legislature of the State of Maine, for the purpose of building and operating a railroad between Oakland, in the county of Kennebec, and Solon, in the county of Somerset, in that State. In order to obtain the money to build its road, the company, on the first day of July, 1871, executed a mortgage to three trustees, covering its railroad and franchises and all its real estate and personal property then possessed by it or to be thereafter acquired. By the terms of the mortgage the trustees were to hold in trust for the holders of the bonds of the railroad company, to be issued by it, payable as therein mentioned. The company thereupon issued and sold its bonds, secured by the mortgage, to the amount of \$450,000, with proper coupons for interest attached, payable semi-annually on the first days of January and July in each year, at the rate of seven per cent, the principal of the bonds becoming due on the first of July, 1891. The proceeds of the sale of these bonds were applied to the building, equipping and operating of the road from Oakland to North Anson, a station between Oakland and the proposed terminus of the road at Solon. In 1876 the road had been completed as far as the village of Anson, twenty-five miles from Oakland, and it was opened and its cars commenced running in that year between those points. The company continued to so operate its road until September, 1883. It had, however, become insolvent some time prior to April 1, 1883, and at that time its coupons for interest on the bonds secured by the above-mentioned mortgage had been unpaid for more

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than three years. At the time when this mortgage was given corporations could be formed by the holders of bonds secured by a railroad mortgage in the manner provided for by the statute. Chap. 51, Rev. Stat. Maine, 1871. In 1878, seven years after the execution of the mortgage, the provision for the formation of corporations by the holders of bonds was extended so as to include the case of railroad corporations where the principal of the bonds should have remained overdue for the space of three years, and by an act of March 6, 1883, the provision was still further extended so as to apply to the case in which no interest had been paid thereon for more than three years.

By virtue of the provisions of the Revised Statutes of 1871, as amended and extended by the statutes of 1878 and 1883 (both statutes as will be seen being subsequent to the execution of the mortgage), the holders of bonds of the Somerset Railroad Company, following the method provided by those statutes, on the 15th day of August, 1883 formed a new corporation under the name of the Somerset Railway. The capital stock of this new corporation was \$736,648.76, made up of the principal of \$450,000 of the unpaid outstanding bonds and \$286,648.76 of interest thereon up to the 15th of August, 1883. This was in accordance with the provisions of the statute that the new company should issue the capital stock to the holders of the bonds, secured by the mortgage, in the proportion of one share of stock for each one hundred dollars' worth of bonds and interest. On the 1st of September, 1883, the Somerset Railway took possession of the railroad from Oakland to Anson (which was as far as it had then been completed), and of all the other property embraced in the mortgage, and it has ever since held and operated the same. Its capital stock was divided into shares of one hundred dollars each to the amount of the bonds and overdue coupons as the law provided. The stockholders of the old company had previously on the 13th of July, 1883, at their annual meeting, voted that the bondholders should organize a new corporation under the statutes of the State, and take possession of the railroad, and at the same meeting voted to surrender possession of the road to the new corporation, the Somerset Railway.

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The holders of a very large majority of these bonds, including some held by the parties in whose interest the plaintiffs in error now act, participated in the formation of this corporation, but the holders of all the bonds did not so participate, a majority being sufficient under the statute for the regular formation of the corporation. Bonds largely exceeding a majority of those which were issued under the mortgage were surrendered to the Somerset Railway and are now held by it, and the stock issued therefor, the amount being at the time the suit herein was instituted \$339,400, and the amount of bonds not surrendered was \$110,600, not counting overdue coupons.

From the time the new company took possession of the railroad it has continued to operate it as far as it was then completed, and it has also extended the same some sixteen miles, and as extended it has continued to operate it.

To obtain the funds necessary for the completion of the sixteen miles of extension the new company, under what is claimed to be due authority of law, issued its bonds on the 1st day of July, 1887, to the amount of \$225,000, payable in twenty years from their date, and to secure payment of the same mortgaged its entire railroad from Oakland to Bingham, forty-one miles. These bonds were sold by the company and the proceeds applied towards the completion of the road. The mortgage given by the Somerset Railroad Company in 1871 included the roadbed from Oakland to the terminus of the road in Solon. The mortgage given by the new company in 1887 embraced the railroad so far as it had been constructed by the old company, as well as the sixteen miles constructed by the new company after it took possession of the road. The giving of this mortgage in 1887 was a matter of public notoriety, well known to the trustees of the original mortgage, and no objection was made in behalf of any one; on the contrary, the trustees stood by and saw this mortgage of 1887 given and the bonds sold to innocent parties and the money expended in extending the railroad sixteen miles, and it was not until more than five years afterwards, when the road had been built and completed and was in operation to Bingham, that the trustees took action.

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In December, 1892, the trustees in the mortgage of 1871 commenced two actions at law, one in each of two counties in which the railroad was situated, in which actions the president of the new corporation, its superintendent, treasurer, accountant and various station agents and conductors were made parties defendant because they were in possession of the road, and the plaintiffs, trustees, claimed to recover from the defendants, as disseizors, the possession of the railroad, and from the defendants, as individuals, the sum of \$180,000 as mesne profits.

The ground upon which the trustees based their action was that the new company was never legally organized ; that by the terms of the mortgage the trustees alone could take proceedings to foreclose the mortgage, and that the acts of the legislature passed subsequently to the execution of the mortgage, and under which the new company was formed, could and did have no validity as against the contract rights of the plaintiffs, secured to them by the law as it stood at the time of the execution of the mortgage of 1871.

Upon these facts and many others which are not now material to be stated, the new company commenced this suit in equity against the trustees in the mortgage of 1871, who were plaintiffs in the two actions at law, to enjoin the further prosecution of those actions and for other relief as mentioned in their complaint. In this suit the new company alleged (among other things) that the trustees in the mortgage of 1871 and their successors had stood by, allowed and encouraged the formation of the new company and the surrendering of the bonds and the issuing of the stock in lieu thereof, and also the execution of the mortgage by the new company to secure the payment of \$225,000 borrowed for the extension of its road ; also the contracting of debts and the expending of large amounts of money in useful repairs and improvements, and that all this was done without the trustees making known to the new company that they or those whom they represented as bondholders had any claim or cause of action against the new company, and the complainants therefore averred that the trustees and those whom they represented had been guilty of such delay and laches as to estop them

PIERCE v. SOMERSET RAILWAY.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

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No. 12. Argued October 11, 12, 1898. — Decided October 31, 1898.

Eustis v. Bolles, 150 U. S. 361, affirmed and followed to the points :

- (1) That to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment, as rendered, could not have been given without deciding it ;
- (2) That where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

THE case is stated in the opinion.

Mr. D. D. Stewart for plaintiffs in error. *Mr. H. B. Cleaves* was with him on the brief.

Mr. Edmund F. Webb and *Mr. Josiah H. Drummond* for

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from denying the validity of the new corporation or its title or possession. The new company also alleged the entire validity of the proceeding resulting in its formation.

Answering that complaint, the trustees denied that the new company was ever established under any law of Maine; they denied that it ever had any legal organization or any legal existence; they denied that the mortgage of July 1, 1871, had ever been legally foreclosed, and they alleged that neither the original board of trustees named in the mortgage, nor their successors, had ever taken any steps towards a legal foreclosure or had ever determined that there had been a breach of the conditions of that mortgage, and that the attempted foreclosure of that mortgage was in violation of the contract rights secured to the trustees thereunder at the time of its execution, and the attempted foreclosure of that mortgage was therefore utterly void; they denied that any statute of the State had been enacted, or could be enacted, which would or could deprive the bondholders or trustees of the rights secured to them by virtue of their contract of July 1, 1871, and the laws of the State in force when the contract was made. They alleged that the contract rights of all the parties to the mortgage of July 1, 1871, were fixed by the laws in force when the mortgage was executed, and that no law of the State of Maine then existing authorized the organization of the new corporation in the manner attempted herein, and that the laws then existing formed a part of the mortgage contract and provided a mode by which the mortgage could be legally foreclosed and a new company formed for the benefit of all the bondholders, and they alleged that the rights of the bondholders who took no part in the formation of the new company were fixed by the mortgage contract and could not be affected in any way, except by payment. Various other matters were set up in their answer which it is not now necessary to mention.

The Supreme Judicial Court of Maine upon these issues held: "(1) That the new company was legally organized; that the various acts of the legislature of Maine, passed subsequently to the execution of the mortgage, did not impair the obligations of the contract contained in the mortgage,

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but simply afforded a more convenient and quicker remedy for a violation of the agreement and for the foreclosure of the mortgage than existed at the time of its execution"; (2) the court also stated and held as follows: "The new corporation took possession of the mortgaged property on the first day of September, 1883, and has ever since held it and operated the railroad. This action was authorized by the statute, consented to by the Somerset Railroad Company, the mortgagor, actively proposed and aided by one at least of the trustees, and ever since acquiesced in by all the trustees. It is too late for the trustees or dissenting bondholders now to object to technical irregularities, if any exist, especially as the Somerset Railway has since extended the railroad from North Anson to Bingham, a distance of about sixteen miles; built a branch railroad of one mile in length of great importance to the productiveness of the main line, placed a mortgage upon the road for \$225,000 to make these extensions and other improvements, and in other ways materially changed the condition and relations of all parties interested in the road. Their long acquiescence, without objection, coupled with the changed conditions and relations resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation."

The court further held that, under the statutes of Maine, the bondholders who had refused to take stock in the new company still retained the same rights under their bonds as the holders of the stock in the new company which had been given in exchange for bonds, and that if any bondholder declined ultimately to exchange his bonds for stock he could not be compelled to do so, and that the net earnings of the company when distributed in the form of dividends or otherwise must be distributed to its stockholders, and to the holders of any unexchanged bonds in equal proportions; that if the holders of unexchanged bonds chose to take stock they could do so at any time or they might retain their present possessions and receive their share of the net earnings *pro rata* with the stockholders.

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It is thus seen that there were two questions determined by the state court: One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal question. The other related to the defence of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a writ of error to the state court cannot be sustained. *Eustis v. Bolles*, 150 U. S. 361; *Rutland Railroad v. Central Vermont Railroad*, 159 U. S. 630; *Seneca Nation v. Christy*, 162 U. S. 283.

A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.

In the above case of *Eustis v. Bolles*, 150 U. S. 361, 368, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. This court held that whether that view of the case was sound or not it was not a Federal question, and therefore not within the province of this court to inquire about.

Mr. Justice Shiras, in delivering the opinion of the court in that case, said:

"The defendants in the trial court depended on a discharge obtained by them under regular proceedings under the insolvency statutes of Massachusetts. This defence the plaintiffs met by alleging that the statutes under which the defendants had procured their discharge had been enacted after the promissory note sued on had been executed and delivered, and that to give effect to a discharge obtained under such subsequent laws would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts it is plain that a Federal question, decisive of the case, was presented, and that if the judgment of

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the Supreme Judicial Court of Massachusetts adjudged that question adversely to the plaintiffs it would be the duty of this court to consider the soundness of such a judgment.

"The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay v. Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that as accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a Federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

Eustis had a right which was protected by the Constitution of the United States. This right, the state court held, he had waived by his action, and this court said whether the state court was right or not, was not a Federal question.

In *Seneca Nation v. Christy*, 162 U. S. 283, it was held by

Syllabus.

the state court that even if there were a right of recovery on the part of the plaintiffs in error because the grant of 1826 was in contravention of the Constitution of the United States (which the court held was not the case), yet that such recovery was barred by the New York statute of limitations. This court held that as the judgment of the state court could be maintained upon the latter ground, it was without jurisdiction because the decision of the state court upon that ground involved no Federal question.

In this case there being two distinct grounds upon which the judgment of the state court was based, each of which is sufficient, and one of which involves no Federal question, we must, upon the authority of the cases above cited, hold that this court is without jurisdiction, and the writ of error must be

Dismissed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE were of opinion that the decree should be affirmed.

PIERCE v. AYER, error to the Supreme Judicial Court of the State of Maine. No. 13. Argued with No. 12.

This writ of error is controlled by the decision in the case just announced. The writ will, therefore, be

Dismissed.